Supreme Court of the United States

OCTOBER TERM, 1969

No. 440

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

RAYTHEON COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RELEVANT DOCKET ENTRIES

4. 6.65	Charge filed.
10.15.65	Amended Charge filed.
10.19.65	Complaint and notice of hearing issued.
10.19.65	Order consolidating cases and notice of hearing on objections, dated.
10.25.65	Respondent's answer to complaint, dated.
1.10.66	Respondent's motion for specification and production of evidence, dated.
1.19.66	Hearing Opened.
1.20.66	Hearing Closed.
6.12.66	Trial Examiner's Decision issued.
7.19.66	Respondent's statement of exceptions.
8. 5.66	General Counsel's cross exceptions, dated.
8. 9.66	Union's statement of exceptions, dated.
10. 5.66	Board's Decision, order and direction of Second Election, dated.
2. 8.68	Board's petition for enforcement filed.
2.21.68	Respondent's answer to petition for enforcement received.
1.16.69	Respondent's motion to dismiss petitions, with memorandum in support, dated.
1.27.69	Union's opposition and answer to motion, dated.
1.28.69	Board's memorandum in opposition to motion to dismiss, dated.

RELEVANT DOCKET ENTRIES

2.19.69	Decision of the Court of Appeals granting motion to dismiss, issued.
2.19.69	Judgments of the Court of Appeals, issued.
3.21.69	Board's petition for rehearing filed.
3.21.69	Union's petition for rehearing received.
5. 8.69	Order of the Court of Appeals denying the petitions for rehearing and rejecting the suggestion for rehearing *en banc*, issued.
8. 6.69	Board's petition for a writ of certiorari filed.
11.10.69	Order of the Supreme Court granting the Board's petition for a writ of certiorari.

160 NLRB No. 122

D-9224
Mountain View, Calif.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 20-CA-3554

RAYTHEON COMPANY

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO

Case No. 20-RC-6201 [1]

RAYTHEON COMPANY, EMPLOYER

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, PETITIONER

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On June 13, 1966, Trial Examiner William E. Spencer issued his Decision in the above-entitled consolidated proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in other unfair labor practices alleged in the complaint. In addition, he recommended sustaining certain objections to the election held on February 4, 1965, in Case No. 20-RC-6201, and setting aside the election. Thereafter, the Respondent filed a Statement of Exceptions, a "Brief in Support of Exceptions to Intermediate

[1] International Brotherhood of Electrical Workers, AFL-CIO, intervened in Case No. 20-RC-6201.

Report; and in Support of Portions of Intermediate Report," and an "Answering Brief to Brief of IUE in Support of Cross-exceptions." The General Counsel filed a Brief in Support of Certain Portions of the Trial Examiner's Decision, cross-exceptions, and a brief in support of its cross-exceptions. International Union of Electrical, Radio & Machine Workers, AFL-CIO, herein called the Charging Party, filed an Answering Brief to Respondent's Brief, cross-exceptions, and a brief in support of its cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified below.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations

[2] We agree with the Trial Examiner that the Respondent violated Section 8(a)(1) of the Act and interfered with the election by Supervisor Krest's coercive interrogation of employee Alvarado, and Vice President Hennemuth's coercive speeches to the employees. We also find, contrary to the Trial Examiner, that the announcement of new grievance procedures, in such speeches, constituted further violation of Section 8(a)(1) and further interference with the election. However, we find it unnecessary to, and therefore do not, rely on the Trial Examiner's finding of additional grounds for setting aside the election. There is no merit in the Charging Party's exception to the Trial Examiner's denial of its motion, made at the hearing, to amend the complaint to allege additional threats and promises of benefit. See *Local 1474-1, Pipe Coverers, International Longshoremen's Association (J.Q.H. Insulating Co., Inc., et al.)*, 147 NLRB 90, 93, footnote 4, Cf. *Automobile Workers* v. *Scofield*, 382 U.S. 205, 219, footnote 14.

Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, Raytheon Company, Mountain View, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified.

1. Add the following at the end of paragraph 1(a): "and promising new benefits as an inducement to employees not to engage in union activity."

2. Delete paragraph 1(b) and substitute the following: "In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959."

(3) In the Notice attached to Trial Examiner's Decision, add the following at the end of the first indented paragraph: "nor will we promise new benefits as an inducement to employees not to engage in union activity."

(4) Delete from the Notice the second indented paragraph, and substitute the following: "WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section

8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959."

(5) Delete from the Notice the last paragraph.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges unfair labor practices not found herein be, and it hereby is, dismissed.

IT IS FURTHER ORDERED that the election held on February 4, 1965, among the Respondent's employees be, and it hereby is, set aside, and that Case No. 20-RC-6201 be remanded to the Regional Director for Region 20 for the purpose of conducting a new election at such time as he deems that circumstances permit the free choice of a bargaining representative.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the appropriate unit at such time as the Regional Director for Region 20 deems appropriate. The Regional Director shall direct and supervise the election, subject to National Labor Relations Board Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible shall vote whether they desire to be represented for collective-bargaining purposes by International Union of Electrical, Radio & Machine Workers, AFL-CIO; by International Brotherhood of Electrical Workers, AFL-CIO; or by neither.

Dated, Washington, D. C. Oct 5 1966

FRANK W. MCCULLOCH, Chairman

GERALD A. BROWN, MEMBER

SAM ZAGORIA, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

TXD-(SF)-73-66
Mountain View, Calif.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 20-CA-3554

RAYTHEON COMPANY

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO

Case No. 20-RC-6201

RAYTHEON COMPANY, EMPLOYER

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, PETITIONER

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Barry Jellison, Esq., and *Morton H. Orenstein, Esq.*, for the General Counsel.

Robert L. Molinar, Esq., and *Selig A. Saltzman, Esq.*, Lexington, Mass., for the Respondent.

Marilyn G. Rose, Washington, D.C., for the Charging Party and Petitioner.

Before: *William E. Spencer*, Trial Examiner

TRIAL EXAMINER'S DECISION

Statement of the Case

The complaint proceeding in this case, brought under Section 10(b) of the National Labor Relations Act as

amended (61 Stat. 136; 73 Stat. 519), hereinafter the Act, consolidated for hearing with objections to an election filed by the charging party and petitioner herein in Case No. 20-RC-6201, was heard in San Francisco, California, n January 19, 20, 1966, pursuant to due notice.

The complaint, issued 19 October, 1965 upon a charge filed April 6, 1965, and an amended charge filed October 15, 1965, alleged various conduct engaged in by the Respondent as violative of Section 8(a)(1) of the Act, conduct incorporated in the objections to the election with some additional matters.

The Respondent in its duly filed answer denied the said allegations. Upon the entire record in the case, consideration of briefs filed with me by each of the parties, and from my observation of witnesses, I make the following:

Findings of Fact

I. The business of the Respondent and Employer

Raytheon Company, a Delaware corporation, is engaged, among other things, in the design, development and manufacture of semi-conductor products and solid state devices. It has facilities located in several States, including Massachusetts and California. Its Mountain View, California plant is the locale of matters giving rise to this proceeding.

During the past year Respondent shipped products valued in excess of $50,000 from its California operations directly to customers outside the State.

II. The labor organization involved

International Union of Electrical, Radio & Machine Workers, AFL-CIO, hereinafter the Union or IUE, is a labor organization within the meaning of the Act.

III. The unfair labor practices

1. *The factual situation; issues*

Pursuant to a representation petition filed by IUE on January 4, 1965, an election among the production and

maintenance employees of Respondent's Mountain View, California plant, was conducted by the Board on February 4. The results were that 161 votes were cast for the IUE, 54 for IBEW, an intervenor, and 301 for no union. On February 11, IUE filed a petition to set aside the election and on April 6, the charge of unfair labor practices which initiated the present complaint proceeding. The issue, broadly stated, is whether Respondent by a series of speeches addressed to its employees on February 2 in a captive audience atmosphere, and by various other statements and conduct, violated Section 8(a)(1) of the Act, and by these alleged statements and conduct, and other matters alleged in the objections to the election, interfered with the free choice of its employees to a degree requiring that the election be set aside.

2. *The Krest-Alvarado incident*

In the week or so preceding the February 4 election, Employee Carol Alvarado was twice called to the desk of Nicola Krest, supervisor of the department in which she worked, and questioned concerning her union activities. Alvarado on these occasions was wearing an IUE badge indicating her support of that union, the only person in her department of some twenty employees that she observed wearing an IUE badge. Krest asked Alvarado why she wanted a union, and when the latter replied that she thought a union could provide employees with a better vacation and sick leave plan and higher wages, Krest replied that it would be impossible for the employees to achieve such additional benefits; that he had not complained to the employees on their work standards, but with a union certain work standards would be set and any employee not meeting them could be discharged; that if the Union was voted in, any employee who was late to work on more than three occasions would be discharged. On the second occasion Krest asked Alvarado if she had attended an IBEW meeting and if so, why. The foregoing is Alvarado's version of the two conversations.

Krest admitted that the conversations occurred; testified in substance that on the occasion of the first con-

versation he called Alvarado to his desk with respect to her requested transfer out of his department, and that Alvarado initiated the topic of unions by saying that if the employees had a union "things like this [the refusal of a transfer] wouldn't happen." Krest testified, "From that point on, we discussed several things about the union," and, in amplification, mentioned the topics of seniority and work standards. On the latter he testified, "I said that I am quite sure that if a union did come into the plant that the union, if they weren't satisfied with the standards which we had on the jobs, would bring in their own industrial engineers. I felt that if they found that our standard was extremely low, they would raise it, you know, if they thought it was completely out of the picture." Krest did not recall if the union was discussed in his second conversation with Alvarado which was concerned primarily, as was the first, with her request for a transfer.

I find, in sum, that Foreman Krest questioned Alvarado concerning her union activities, interrogated her concerning her desire for union representation, and stated, in substance and effect, that she stood to lose rather than gain through union representation in the matter of work standards, and would be unable to obtain the benefits she sought. His remarks took on added emphasis and significance when Robert G. Hennemuth, a company official, later addressed the employees on the same general topic of what union representation would mean to them.

3. *The February 2 Hennemuth speeches*

In its captive audience speeches, delivered successively to seven groups of its employees on February 2, the Respondent, through its industrial relations vice-president, Robert G. Hennemuth, counseled its employees to reject union representation. As urged in Respondent's brief, Hennemuth, though unequivocally partisan in his language, made his "pitch" without rancor and in an atmosphere which was undoubtedly calculated to, and did in fact convey the appearance of friendly counsel. At the close of his speech, there would be a period of ques-

tions from the floor responded to in good humor by Hennemuth, and other instances of good-humored give-and-take. Nevertheless, Hennemuth made it clear in the introduction to his remarks that he was a top figure in Respondent's hierarchy of officers and therefore spoke with authority, and frequently referred to the "legal" posture of his remarks. The body of his speeches was tape-recorded and transcriptions from the tapes were received in evidence. There were portions of his speech, however, which were not recorded, and therefore the transcriptions were not necessarily a refutation of the testimony of employees who heard the speeches. The latter, except for variations in emphasis, were not markedly at variance with the recorded portions of the speeches.

Hennemuth's speeches were organized and delivered under four major points or topics, and these will be alluded to seriatum.

First, Hennemuth stressed the importance of all employees voting and the secrecy of the ballot which would protect employees in voting against union representation even though they had signed one or more union authorization cards. "Regardless of whether you signed for one or both, that is not binding on you. . . . When you engage in this voting process on Thursday you are a free person."

Hennemuth's second point, and one that received the greatest emphasis and undoubtedly took precedence over others in the minds of the employees, was that if the employees chose union representation, negotiations on a contract would follow; that such negotiations would start from scratch and the employees could end up losing some of their present benefits;[1] that a union could not guar-

[1] Excerpts from Hennemuth's speeches: ". . . in a negotiation they [the employees] had to understand that legally the Company and the Union start from scratch . . . what happens in negotiation is that two parties sit down to negotiate and they start fresh—just as though nothing's on the table . . . in negotiations they have to get up to where you are—where the company is, first—before you even get any more." [This point was given added emphasis by a leaflet passed out by Respondent to its employees on January 14, 1965, which stated in part: "When a union comes into a plant, collective bargaining begins not at the present wage level, but at

antee them anything but could gain for them only such benefits as the company would grant;[2] that a union's only weapon for enforcing bargaining demands was the strike and that a strike would impose hardships on the employees who engaged in it.[3] Hennemuth told the employees, "My suggestion to you is that working for this company under the circumstances as I know them at least, I feel you don't need that kind of representation because I really feel that compared to other American citizens across the country working for a number of different companies, you don't look too bad at all, really,

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zero . . ."] In negotiations an employer might say, "Look, we are sick and tired of paying nine holidays and now we are only going to agree to five."

Further, on the combined credited and undisputed testimony of General Counsel's witnesses, Alvarado, Hudson, Lott and Carpenter, Hennemuth said that while employee insurance was now "free," if the Union won this benefit would have to be negotiated from scratch and the employees might end up having to pay for what they presently were getting free; gave a specific example of a company which took away bus fare formerly given its employees as a fringe benefit, when a union came into the plant; and said that they should not be misled by thinking that the benefits they presently had would necessarily continue if the Union came into the plant.

[2] Excerpt from Hennemuth's speeches: ". . . you should bear in mind that a union cannot guarantee you anything. Now I'm telling you, legally if I may in this sense, because if a union wins the right with any company to represent the employees involved, a period of negotiation must follow after that point and there comes into being between the union and the company after that *only what the company wants to agree to . . .*" (Emphasis supplied)

[3] Excerpts from Hennemuth's speeches: "So let's suppose that the company doesn't want to agree—what recourse does the union have? The only recourse is to strike . . . I'm sure you all have had some exposure to what a strike can mean. It's a harsh thing, it is a weapon that in my opinion personally is not a terribly useful thing to the unions because it imposes such a hardship on the people who are members of the unions. They go without pay during the entire period of the strike. Now sometimes there is a 'strike fund' a union may have but this is usually inadequate and then it usually often doesn't last except for a couple of weeks and it requires you to go out and do picket line duty, and so forth. Now, this might be all right in its place, understand. My suggestion to you is, that working for this company under the circumstances as I know them at least, I feel you don't need that kind of representation, etc."

as far as your benefits are concerned," that in the light of all these circumstances the employees should carefully evaluate the Union's claims put forth in its election propaganda because "you will not get anything more from this company with a union than you would get without a union and in the meantime you are going to be paying out $40 to $50 a year and perhaps more."

Hennemuth's third point consisted largely of a review of Respondent's wage structure and fringe benefits and comparisons with other plants operating under union contracts; a statement of Respondent's grievance procedure characterized as a "darn firm open door policy" on the part of its local manager, Fred Wills, and a promise that in the future this procedure would be further liberalized by permitting any aggrieved employee who was not satisfied with the response of the local office to appeal directly to Hennemuth in Respondent's main office; and an elaborate defense of Respondent's existing sick leave policy: "So bear in mind, that even if a union does come on these premises as a result of Thursday, that does not mean any such union will get paid sick leave. And I'm saying to you right now, it won't. This is not because we don't think it's a desirable benefit . . . We are just not ready to put in that kind of an expense in our fringe benefit package at this time, especially where we are now convinced that we already have a package that is as good as any you will find in industry generally." In this connection, Hennemuth told the employees that "no unionized plant in Raytheon has paid sick leave either." In summing up, Hennemuth told the employees, "So again, repeating the third thought I want to leave with you, without paying any of these costs that are union-involved, you already have a whole good series of kinds of compensation which once again I am satisfied would not have been any better even if you had had a union here and in the future it won't be any better just because a union is on the premises."

Hennemuth's "fourth and final" point was in substance an appeal to the loyalty of the employees. Coupled with this was the statement that in the three years that Re-

spondent had operated its Mountain View plant, with an outlay of millions, it had "never taken one lick of profit out of here." Followed a discussion of the company's "continuing determination to make a go of this place," and a final appeal, "So this is why I say to you that Raytheon in these three years has never given up on you. You know, we've had some rough sledding and we are asking you, please, to continue to work with us as a team. Give Mr. Wills the opportunity to make a profitable venture out of this and do it, please, without the intervention of some unnecessary outsider who can cause trouble by harrassment [sic], who can take money away from you, and who we are convinced is not going to bring you anything in return that you wouldn't get otherwise."

4. *Concluding findings*

While the Act provides that an employer's failure or refusal to agree to a union's proposals does not in and of itself constitute a refusal to bargain in good faith, this by no means licenses any employer to enter into bargaining negotiations with a mind closed against extending or varying existing employee benefits. An employer who tells his employees that they can gain through union representation only what he, the employer, unilaterally *chooses* to give them, and that they will gain no additional benefits through bargaining but stand to lose benefits already enjoyed, is not merely predicting what may be the ultimate results of collective bargaining, or stating mere possibilities, but is making flat statements of a pre-determined position on bargainable issues and is therefore voicing a rejection of the bargaining principle. What could be more illustrative of such a state of mind than Hennemuth's statement to the employees with respect to sick leave, an issue which obviously was a campaign issue: "So bear in mind, that even if a union does come on these premises as a result of Thursday [the election], that does not mean any such union will get paid sick leave. *And I'm saying to you right now, it won't,*" (emphasis supplied) and his further statement, "So again, repeating the third thought I want to leave

with you, without paying any of these costs that are union-involved, you already have a whole good series of kinds of compensation which once again I am satisfied would not have been any better even if you had had a union here *and in the future it won't be any better just because a union is on the premises.*" (emphasis supplied) The impact of these and kindred statements on the employees' minds is neither negatived nor neutralized by an occasional reference to the employees' freedom of choice and Respondent's intention to deal with them in good faith, regardless of the outcome of the election. As a matter of fact, in all the Hennemuth speeches there is not a single unequivocal statement that if the employees choose union representation the Respondent will enter into negotiations with an open mind on bargaining issues and will attempt, in good faith, to reach an agreement satisfactory to both the employer and the employees—essential elements of good faith bargaining. In the same category is Hennemuth's statement that in talking to the employees he was walking a tightrope since he could neither offer benefits nor threaten reprisals in the matter of their choice of union representation, in a context in which he was instilling fear into their minds that union representation though costly would be futile, and that a union's only recourse in obtaining for the employees anything that Respondent did not choose to give, was the strike with the attendant hardships that would be visited on the employees in such event. In sum, for all their carefully contrived appearance of amiability, the Hennemuth speeches were larded with statements which amount to an anticipatory refusal to bargain and as such were poorly concealed threats to deprive Respondent's employees of any and all benefits to be derived from the exercise of the right to collective bargaining through representatives of their own choosing. Supervisor Krest's interrogations of Alvarado about her union activities and statements that she could not gain but would lose through union representation, though minor in comparison, are not properly considered as isolated statements of a minor supervisor, but as a part of Respondent's general plan

of coercion as fully demonstrated in the Hennemuth speeches.

I find that the Respondent through Krest's anti-union statements and interrogation of Alvarado and, in major part, through the Hennemuth speeches, interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, thereby engaging in conduct violative of Section 8(a)(1) of the Act.[4]

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[4] Hennemuth's statement that employees might address him directly in Respondent's eastern office with respect to grievances, is alleged to constitute an unlawful inducement, and while undoubtedly it was made to court favor with the employees, I am unable to view it as substantial enough to constitute a violation of Section 8(a)(1). Employees would have to be naive indeed to believe that Hennemuth in Respondent's eastern office would seriously entertain an individual grievance arising in the Mountain View plant already weighed and rejected by the local plant manager, and in any event a disgruntled employee could always avail himself of the freedom of the mails to address officials in the eastern office. I am also unable to view increased wages and benefits extended employees in September, 1965, some six months after the election, as a reward for the employees' rejection of union representation. In extending these benefits Respondent did compliment the employees on their "loyalty" but reference was also made to increased production. The matter is not entirely free from doubt due to the rather gloomy profit-and-loss picture given the employees by Hennemuth in February prior to the election, but I do not find a preponderance of evidence supporting an unlawful motive. Respondent's interrogation of Employees Shirley Ball and Katherin Lott through its counsel, Robert L. Molinar and Selig A. Saltzman, alleged to constitute unlawful interference with General Counsel's witnesses, has flimsy support in the testimony of Ball and Lott except that it does appear that they were asked if they had been interviewed by Board agents, and the latter was questioned about future appointments, if any, with such agents. The interviews appear to have been centered on the employees' recollection of Hennemuth's speech; the employees do not appear to have been questioned concerning the substance of their interviews with Board agents; Bell testified that Molinar told her not to worry about being subpoenaed to testify, "just to come in and tell the truth" as best she could, and if questioned by Board agents to tell them that she had been interviewed by the company lawyers; Lott admitted that at the start of the interview Molinar told her she was free to answer questions or not as she saw fit. While I believe it was improper for Respondent's counsel to question these employees concerning their meetings with

IV. Objections to the conduct of the election

Pursuant to a stipulation for certification upon a consent election executed by the parties on January 14, 1965, an election was conducted among Respondent's employees on February 4. On February 11, the petitioner herein filed timely objections to the conduct of the election. On June 2, the Board's Regional Director issued and served on the parties his report on objections; in which he recommended to the Board that the objections be consolidated for hearing with the complaint herein. On June 23, the Employer filed timely exceptions to the report and to the Regional Director's recommendation on the consolidation of cases. The matter was referred to the Board and on August 10, the Board found the exceptions without merit and ordered the hearing herein.

On all the evidence before me I find the objections to the conduct of the election well taken and shall recommend that the election of February 4 be set aside.

As set forth in detail in the preceding section of this report, the employer in seven speeches addressed to groups of employees sought to convince them that they should reject union representation. Only one day intervened between these speeches and the election. The petitioner requested permission to address the employees in similar fashion and the request was ignored. The employer's rule against "selling, soliciting, canvassing or distributing without prior management approval," effectively foreclosed the petitioner from presenting its claims and arguments to employees while they were on company premises. It issued numerous pamphlets but for their distribution had to rely on passing them out to employees on their entering or leaving company premises, mailing them to the employees' homes, or passing them out at union meetings. With respect to the first, many of the employees lived in geographical areas removed by miles from the plant, and therefore substantial numbers drove

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Board agents preparatory to testifying, and it is clear that such interrogations were in no way necessary or material to the preparation of a defense, the coercive element appears to have been slight if not altogether non-existent.

to and from work, about 95 percent according to estimates. The petitioner being barred from the company's parking lot, had to rely on reaching these employees as they were driving in and out of the lot. As to mailing, the petitioner had to ascertain the mailing address of the employees "by word of mouth" and as a result could reach only a small percentage of the total employment. Its meetings, according to its representatives, were attended largely by those who were highly partisan on behalf of the Union or who vigorously opposed it, and therefore the Union was unable to reach those who were neutral or not yet convinced one way or the other. Also, inasmuch as the plant was operating on three shifts, and meetings during the work week normally would follow at the end of a shift, obviously the hours were not propitious for drawing large numbers to the meetings.[5]

In short, on the facts of this case it is clear that through Respondent's restrictive rule on solicitations and because of other circumstances noted above, the employees were effectively barred from anything approaching an equal or comparable opportunity for hearing arguments favoring union representation, or contesting and refuting the propaganda literature and the captive audience speeches of the Employer. For this reason alone I would hold that the employees were denied the freedom of choice such as would have been theirs—and to which I think they were entitled—had they been afforded at least a reasonable approximation of equal access to the copious representations made by both proponents and opponents of union representation. It is on the basis of these findings, and interference violative of Section 8(a)(1) of the Act as found in Section III above, that I recommend that the election of February 4, 1965 be set aside.[6]

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[5] For instance open meetings for employees on the swing shift would start at 1 a.m.

[6] I agree with petitioner that coercive conduct engaged in by General Foreman Burke and Foreman Blackburn with respect to employees wearing IUE badges, not alleged as constituting unfair labor practices and occurring prior to a representation petition

Upon the basis of the foregoing findings of fact and upon the entire record in the case I make the following:

Conclusions of Law

1. The Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent's conduct as found in sections III and IV, *supra*, improperly affected the results of the election of February 4, 1965.

The Remedy

Having found that Respondent engaged in certain unfair labor practices I shall recommend that it cease and desist therefrom and that it take certain affirmative action to remedy and to remove the effects of the unfair labor practices and to effectuate the policies of the Act.

As I have found that Respondent's conduct improperly affected the results of the election I shall recommend that the election be set aside.

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being filed, may nevertheless be considered as background to conduct in issue, such as Krest's interrogation of Alvarado and the Hennemuth speeches, and when so considered tends to place the remarks of Krest, but more particularly Hennemuth, in their true perspective, since the few intervening months would not have sufficed to erase from the minds of affected employees fears of reprisal stemming from the Burke-Blackburn interrogations and threats. However, the exclusion from consideration of such background matters would leave, unaltered, the conclusions expressed in the text above.

RECOMMENDED ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the Act, it is recommended that the Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees in an unlawful manner concerning their union activities; threatening or implying a loss of existing benefits in the event they choose union representation; threatening or implying an anticipatory refusal to bargain on bargainable issues, such as sick leave, in such event.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action:

(a) Post in its Mountain View, California, plant copies of the notice attached hereto marked "Appendix A."[7] Copies of said notice to be furnished by the Regional Director for the Twentieth Region shall, after being signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the Regional Director for the Twentieth Region in writing within 20 days from the date of the

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[7] If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of the United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

receipt of this Decision what steps Respondent has taken to comply herewith.[8]

It is further recommended that the election which was conducted on February 4, 1965, be set aside.

Dated:

/s/ William E. Spencer
WILLIAM E. SPENCER
Trial Examiner

[8] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Twentieth Region in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT (AS AMENDED)

we hereby notify our employees that:

WE WILL NOT interrogate our employees in an unlawful manner concerning their union affiliation and activities; interfere with their freedom of choice with respect to union representation by stating or implying a loss of existing benefits in the event they choose union representation; stating or implying an anticipatory refusal to bargain in good faith on bargainable issues in such event.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form, join or assist INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

WE WILL, on request, bargain in good faith on bargainable issues, including sick leave, in the event our employees designate the above-named union or

any other labor organization, their bargaining representative.

RAYTHEON COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 450 Golden Gate Avenue, Box 36047, San Francisco, California, 94102 (Telephone No. 556-0335).

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, Raytheon Company, Mountain View, California, its officers, agents, successors, and assigns. The proceeding resulting in said Order is known upon the records of the Board as Case Nos. 20-CA-3554 and 20-RC-6201.

In support of this petition the Board respectfully shows:

(1) Respondent is engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on October 5, 1966, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law and, the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony, and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

/s/ MARCEL MALLET-PREVOST
MARCEL MALLET-PREVOST
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this day of

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

ANSWER OF RESPONDENT RAYTHEON COMPANY TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Raytheon Company (referred to herein as "Respondent") for answer to the petition of the National Labor Relations Board (referred to herein as the "Board") for the enforcement of its order against Respondent in the proceeding known upon the record of the Board as case Nos. 20-CA-3554 and 20-RC-6201, admits, denies and alleges as follows:

1. Admits that Respondent is engaged in business in the State of California within this judicial circuit and that this Court has jurisdiction of the petition by virtue of Sec. 10(e) of the National Labor Relations Act as amended (referred to herein as the "Act").

2. Denies that Respondent has engaged in any unfair labor practices within the meaning of Section 8(a) of the Act or has engaged in conduct which interfered with the representation election conducted under the direction and supervision of the Board's Regional Director at Respondent's Mountain View, California plant on February 4, 1965.

3. Alleges that the Trial Examiner's Findings of Fact, adopted by the Board, are not supported by substantial evidence in the record.

4. Alleges that the Trial Examiner's Conclusions of Law, adopted by the Board, to the effect that Respondent engaged in unfair labor practices proscribed by Sec. 8 (a) (1) of the Act and in conduct which interfered with said representation election conducted on February 4, 1965, are incorrect, erroneous and contrary to established legal precedent.

5. Alleges that the proceeding in case Nos. 20-CA-3554 and 20-RC-6201 is now moot as the conduct litigated in said proceeding was related to the first election conducted February 4, 1965 and in accordance with the Board's order a second election was conducted on June 23, 1967, under the direction and supervision of the Board's Regional Director.

6. Alleges that the order of the Board deprives Respondent of its right to free speech guaranteed by the First Amendment to the Constitution of the United States and by Sec. 8(c) of the National Labor Relations Act.

WHEREFORE, Respondent prays that this Court deny enforcement of the order of the Board in case Nos. 20-CA-3554 and 20-RC-6201 dated October 5, 1966.

Respectfully submitted,

ALFRED C. RHILLIPS
141 Spring Street
Lexington, Mass. 02173
Attorney for Raytheon Company

February 19, 1968

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

DOCKET No. 22,572

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RAYTHEON COMPANY, INTERVENOR

DOCKET No. 22,572A

MOTION OF RAYTHEON COMPANY TO DISMISS PETITIONS ON GROUND OF MOOTNESS AND MEMORANDUM IN SUPPORT THEREOF

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Raytheon Company, Respondent in Case No. 22,572, and Intervenor in Case No. 22,572A respectfully moves this Court, for an order dismissing the petitions in Cases Nos. 22,572 and 22,572A on the ground of mootness.

The facts upon which this motion is based are as follows:

On January 4, 1965, a petition for a representation election among production and maintenance employees

at Raytheon's Mountain View plant was filed with the National Labor Relations Board's regional office in San Francisco by the International Union of Electrical, Radio and Machine Workers, AFL-CIO (referred to herein as the "Union"). The proceeding initiated by the petition was designated on the records of the Board as Case No. 21-RC-6201.

In an election conducted on February 4, 1965, pursuant to a consent agreement, the final tally of ballots was: 301 for no union; 161 for IUE; and 54 for IBEW (an intervenor).

On February 11, 1965, the IUE filed objections to the election, and on April 6, 1965, it filed an unfair labor practice charge designated on the records of the Board as Case No. 20-CA-3554. (R 3)* By order of the Board's regional director dated October 19, 1965, the objections to the election in Case No. 20-RC-6201 and the unfair labor practice charge in Case No. 20-CA-3554 were consolidated for purposes of hearing. (R 12)

Following a hearing held on January 19 and 20, 1966, the trial examiner issued a decision dated June 13, 1966, in which he recommended that the election in Case No. 20-RC-6201 be set aside and that an order be entered in Case No. 20-CA-3554 finding that a speech by Raytheon Vice President Hennemuth and statements made by supervisor Krest to employee Alvarado constituted unfair labor practices within the meaning of Section 8(a)(1), requiring imposition of a cease and desist order and posting of an appropriate notice. In a decision, order and direction of second election issued on October 5, 1965, the Board, in substance, sustained the findings of the trial examiner. (R 41-44)

That portion of the Board's order pertaining to the unfair labor practice findings in Case No. 20-CA-3554 is presently before this Court in Cases 22,572 and 22,572A.

Pursuant to that portion of the Board's order pertaining to the objections to the election in Case No. 20-RC-6201, a second election was held on June 23, 1967. The final tally of ballots in that election was: 418 for no

* Designation R—refers to volume 1 of the Record on Appeal in these cases.

union, and 312 for IUE. Thereafter, on June 29, 1967, the IUE filed objections to the election. On September 27, 1968, the Board issued an order setting aside the second election and directing a third election. In the third election conducted on November 1, 1968, the final tally of ballots was as follows: 258 for no union; 204 for IUE. A copy of the Tally of Ballots is annexed hereto as Exhibit A and made a part hereof.

Thereafter, on November 12, 1968, the regional director issued a certification of results of election to the effect that no labor organization is the exclusive representative of the employees in the unit. A copy of this certification is annexed hereto as Exhibit B and made a part hereof.

WHEREFORE, Raytheon Company respectfully requests that this Court grant its motion to dismiss the proceedings herein on ground of mootness.

ALFRED C. PHILLIPS
PAUL B. ASCHER
Attorneys for Raytheon Company

By /s/ Alfred C. Phillips
ALFRED C. PHILLIPS

Dated at Lexington, Mass.
this 16th day of January, 1969

EXHIBIT A

NATIONAL LABOR RELATIONS BOARD

Case No. 20-RC-6201

Date issued November 1, 1968

RAYTHEON COMPANY, EMPLOYER

and

INTERNATIONAL UNION OF ELECTRICAL RADIO & MACHINE WORKERS, AFL-CIO, PETITIONER

Type of Election: *(Check one)*	*(If applicable check either or both):*
☐ Stipulation	☐ 8(b) (7)
☒ Board Direction	☐ Mail Ballot
☐ Consent Agreement	
☐ RD Direction	RERUN

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters	514
2. Void ballots	—
3. Votes cast for Petitioner	204
4. Votes cast for	—
5. Votes cast for	—
6. Votes cast against participating labor organization(s)	258
7. Valid votes counted (sum of 3, 4, 5, and 6)	462
8. Challenged ballots	1
9. Valid votes counted plus challenged ballots (sum of 7 and 8)	463
10. Challenges are (not) sufficient in number to affect the results of the election.	

11. A majority of the valid votes counted plus challenged ballots (item 9) has (not) been cast for: Petitioner

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For the Regional Director

/s/ Wm. Englin

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For RAYTHEON COMPANY
/s/ Jan Holt

for INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO
/s/ Hazel Cano

RC-RM-RD
EXHIBIT B

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Case No. 20-RC-6201

RAYTHEON COMPANY, EMPLOYER
and
INTERNATIONAL UNION OF ELECTRICAL RADIO & MACHINE WORKERS, AFL-CIO, PETITIONER

TYPE OF ELECTION (Check one)	(Also check box below where appropriate)
☐ Consent Agreement	☐ 8(b)(7)
☐ Stipulation	
☒ Board Direction	
☐ RD Direction	

CERTIFICATION OF RESULTS OF ELECTION

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that no collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board,

IT IS HEREBY CERTIFIED that a majority of the valid ballots has not been cast for any labor organization appearing on the ballot, and that no such organization is the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

Signed at San Francisco, California
On the 12th day of November, 1968

[SEAL]

/s/ Roy O. Hoffman
Regional Director, Region 20
National Labor Relations Board

Memorandum In Support of Motion To Dismiss Petitions On Ground of Mootness

The petitions before the Court in Cases 22,572 and 22,572A are based upon a pre-election speech given by Raytheon Vice President Hennemuth to eight separate groups of employees and two alleged conversations between supervisor Krest and employee Alvarado. Both the speech and the alleged conversations occurred immediately prior to the first election in Case 20-RC-6201, which was conducted by the Board on February 4, 1965. As set forth in the Motion, the election of February 4, 1965, was set aside and a second election was held on June 23, 1967; the second election was set aside and the third election was held on November 1, 1968. The results of the third election have been certified by the Board.

These facts are identical in all material respects with those before this Court in *General Engineering, Inc.*, 311 F. 2d, 570 (CA 9) (9th Cir. 19). That case established that issues on review relating to pre-election conduct become moot where subsequent to issuance of its order relating to said conduct, the Board has held another election, the results of which have been certified. In reaching this conclusion, the Court relied upon the decision of the Supreme Court in *National Labor Relations Board*, v. *Jones & Laughlin Steel Corporation*, 331 US 416, 67 S.Ct. 1274, 91 L.ed. 1575 (1947) which held that Courts of Appeals in reviewing Board decisions have discretion to decide under particular circumstances whether an order has become moot.

It is submitted that, decisions in other circuits notwithstanding, this Circuit's decision in the *General Engineering* case is correct and should be applied to this case. Accordingly, the issues presented relating to the legal effect of the Hennemuth speeches and of the alleged conversations between supervisor Krest and employee Alvarado, are now moot. In each instance the alleged conduct was directly and immediately related to the election and, in fact, the Board relied solely on the Hennemuth speeches and Krest conversations in setting aside the election. (R 42 n. 2). In view of the subsequent certifi-

cation, these issues no longer require resolution by this Court. Therefore, both petitions herein should be dismissed.

Respectfully submitted,

ALFRED C. PHILLIPS
PAUL B. ASCHER
Attorneys for Raytheon Company

By /s/ Alfred C. Phillips
ALFRED C. PHILLIPS

Dated at Lexington, Mass.
this 16th day of January 1969.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RAYTHEON COMPANY, INTERVENOR

MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO MOTION OF RAYTHEON COMPANY TO DISMISS ON GROUND OF MOOTNESS

As set forth in our brief on the merits (Br., p. 6), Raytheon Company (herein the "Company"), pursuant to the normal administrative procedure, was found by the Board to have engaged in certain unfair labor practices. Specifically, the Board found that the Company had violated Section 8(a)(1) of the Act by coercively interrogating its employees as to their union activities, threatening that the employees would suffer a loss of existing benefits in the event they chose union representation; and promising an improved grievance procedure as an inducement to employees not to engage in union activity (R. 41-42, 18-26).[1] Accordingly, the Board acting pursuant to the authority granted by Section 10(c) of the Act, ordered the Company to cease and desist from the unfair labor practices found and to post the customary notice (R. 42-43, 26-28). In addition, the Board performing its duty of overseeing

[1] "R" references are to the pleadings and formal papers filed with the Court as "Volume I, Pleadings" in the instant case.

representation elections as set forth in Section 9 of the Act, directed that an election held among the Company's employees be set aside and directed the holding of a second election on the grounds that the aforementioned Company conduct had interfered with the holding of a fair election.[2]

Since the Board's decision was issued herein, as the Company correctly points out, a second and a third election have been held. In the first of these subsequent election the results were also set aside by the Board because of certain Company conduct. The results of the third election, however, which the Union lost by a vote of 258-204, were not objected to, and the Board, accordingly, certified that a majority of the employees had voted against being represented by any labor organization.

In its motion to dismiss and supporting memorandum filed herein the Company contends that since a valid and determinative election has been held, there no longer is any need for enforcement of the Board's remedial order in the unfair labor practice case and the petition for enforcement should be dismissed as moot. We submit, however, that the Company's contention misconceives the function and purpose of a Board cease and desist order and is contrary to settled law.

Initially, it is important to remember that Section 10 (c) of the Act expressly authorizes the Board to order a person who has engaged in an unfair labor practice "to take such affirmative action * * * as will effectuate the policies of this Act" and that under this provision, the Board has the power to enter an order which will restore "the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practices]" *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194 (1941). See also, *N.L.R.B.* v. *Strong, d/b/a Strong Roofing & Insulating Co.*, U.S. 70 LRRM 2100 (January 15, 1969); *Fibreboard Corp.* v. *N.L.R.B.*, 379 U.S. 023, 216

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[2] Under settled Supreme Court law, the propriety of the Board's decision to set aside the election is not before this Court for review. *A.F.L.* v. *N.L.R.B.*, 308 U.S. 401, 408-412 (1940); *Holly Hill Lumber Co.* v. *N.L.R.B.*, 380 F. 2d 838, 840 (C.A. 4, 1967); *Hendrix Mfg. Co.* v. *N.L.R.B.*, 321 F. 2d 100, 106 (C.A. 5, 1963) See also, *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 477 (1964).

(1964). Under Section 10(c) it was clearly proper for the Board to issue a cease and desist order and notice posting requirement. Indeed, the Company does not even challenge the traditional appropriateness of this judicially approved remedy. See *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 230-231 (1938).

The Company is mistaken in its assertion that this proceeding to enforce the Board's order is rendered moot by the fact that since issuance of the Board's decision and order a valid election has been held in which the Board certified the results. An almost identical contention was expressly rejected in *N.L.R.B.* v. *Greyhound Lines*, 303 U.S. 261, 271 (1938). As the Court there stated, an order of the Board, "lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made" (*Ibid.*).[3] Accord, *N.L.R.B.* v. *Metalab-Labcraft*, 367 F. 2d 471, 472-473 (C.A. 4, 1966); *N.L.R.B.* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109, 111 (C.A. 7, 1963), cert. denied 377 U.S. 944; *N.L.R.B.* v. *Clark Bros. Co.*, 163 F. 2d 373, 375 (C.A. 2, 1947). As the Seventh Circuit stated in a case just like the one at bar, *N.L.R.B.* v. *Marsh Supermarkets, Inc.*, *supra*, 327 F. 2d at 111: "* * * if the Board's order is justified, it is entitled to have it enforced as a means of insuring that *in future elections the conduct may not be repeated* * * *" (emphasis added). Similarly, in this case, although a valid election has been held, the Board is entitled to have its order enforced in order to deter similar conduct in the event of future elections.

Rejection of the Company's motion is also required by the Supreme Court's decision in *N.L.R.B.* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950). There, the employer resisted enforcement of the Board's order on the ground that he had complied with its requirements and accordingly, since the case had thereby been rendered moot there was no need for a court decree. This conten-

[3] In *Greyhound*, the employer had urged that the Board's order requiring it to withdraw recognition from an employee association was rendered moot when a different union was certified by the Board as the exclusive bargaining representative of the employees.

tion was flatly rejected, the Court pointing out that, "A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree." *Id.*, at 567, emphasis added. Accord, *N.L.R.B.* v. *Rippee*, 339 F. 2d 315, 316 (C.A. 9, 1964).

Finally, we recognize that this Court's decision in *General Engineering, Inc.* v. *N.L.R.B.*, 311 F. 2d 570 (1962) is at odds with the Board's position as set forth above. It is respectfully requested, however, that this Court reconsider its decision in *General Engineering* in light of the Supreme Court's decisions in *N.L.R.B.* v. *Greyhound Lines*, *supra* and *N.L.R.B.* v. *Mexia Textile Mills*, *supra*. In addition, we would also point out that in *N.L.R.B.* v. *Rippee*, *supra*, decided subsequent to *General Engineering*, the Court rejected a contention that a change in circumstances rendered a Board order moot.[4]

CONCLUSION

For the reasons stated it is respectfully submitted that the Company's motion should be denied.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
ALLISON W. BROWN, JR.,
JOHN I. TAYLOR,
Attorneys,
National Labor Relations Board.

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[4] In *General Engineering, Inc.*, the Court appeared to consider as controlling certain language in *N.L.R.B.* v. *Jones & Laughlin Steel Co.*, 331 U.S. 416, 428 (1947). The quoted portion, however, does not stand for the principle that a subsequent valid election renders a Board order moot; rather, it simply states that when a Board order is moot enforcement may be denied. Since, as we have shown above, the Board is entitled to have a court decree *barring* the resumption of unfair labor practices, we submit that the Board's order herein has not been rendered moot and enforcement should be granted. See *N.L.R.B.* v. *Marsh Supermarkets, Inc.*, *supra*, 327 F. 2d at 111.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Docket No. 22,572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

Docket No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RAYTHEON COMPANY, INTERVENOR

OPPOSITION AND ANSWER TO MOTION

NOW COMES, the International Union of Electrical, Radio and Machine Workers, AFL-CIO (herein "the IUE"), the petitioner in Appeal No. 22,572A and the intervenor in Appeal No. 22,572, and opposes the Motion of the Raytheon Company (herein, "the Company") to dismiss the said appeals on the ground of mootness.

Mootness is claimed for the reason that the IUE proceeded with the election that the Board directed in Case No. 20-RC-312, following the invalidation of an earlier election as a result of objections filed by the IUE. In effect, the Company argues that it is not required to remedy unfair labor practices because they occurred during the previous election campaign and that the election which was subsequently held was certified as a valid one.

Election objections are considered in relation to the laboratory conditions that the Board requires for the conduct representation election and may not be equated with

unfair labor practices, which is the subject of the Board's order and remedy in this case.

In *Sonoco Products Co.* v. *N.L.R.B.*, —— F.2d —— (9th Cir., Aug. 7, 1968, No. 24,802), 69 LRRM 2037, this Court sustained the Board's broad discretion in certifying election results, and setting them aside, as follows:

> "Petitioner's claim that section 8(c) of the Act bars the conclusion we have reached must be rejected. That section provides,
>
> > 'The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.' 29 U.S.C. § 158(c) (1964).
>
> "Here, however, Hughes' speech directly resulted not in the finding of an unfair labor practice, but merely in the invalidation of the first election.
>
> "There is some force to petitioner's contention that the distinction between a ruling that an unfair labor practice has been committed and a decision to set aside an election is not really meaningful so far as the strictures of section 8(c) are concerned. For when an employer challenges an adverse representation decision by refusing to bargain with the winner of a subsequent election—as an employer must do in order to secure review of such a decision—an employer will of course be found to have violated section 8(a)(5) of the Act if the representation decision is upheld. Speech protected by section 8(c) may, then, play a real part in the ultimate finding of an unfair labor practive. *We read Foreman & Clark, Inc. v. NLRB, 215 F.2d 396, 408-09, 34 LRRM 2697 (9th Cir.), cert. denied, 348 U.S. 887, 35 LRRM 2129 (1954), however, as committing this court to the contrary position—a position we cannot conclude is unsound.* See also NLRB v. Shirlington Supermarkets,

> Inc., 224 F.2d 649, 652-53, 36 LRRM 2485 (4th Cir.), cert. denied, 350 U.S. 914, 37 LRRM 2142 (1955)." (Underlining supplied.)

And in *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F.2d 396, 410 (9th Cir. 1954), certiorari denied 348 U.S. 887, this Court also said:

> "Under the facts of this case, however, viewed in the light of the decisions applicable thereto, we agree with the Board's determination that the tailor-shop employees constitute an appropriate bargaining unit, and with its decision to set aside the first election because of the Company's last minute campaign speeches during working hours, under the circumstances already detailed. The latter decision was a proper exercise of the Board's 'wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees'. National Labor Relations Board v. A. J. Tower Co., supra, 329 U.S. at page 330."

See also *General Shoe Corporation*, 77 NLRB 124, 126, 127. To equate the subsequently conducted election as an event that removed the requirement of a remedy for the employer's unfair labor practices in the previous election campaign, would have the effect of qualifying and limiting the discretion of the Board with respect to its conduct of elections. Certainly, the aforesaid event may not be deemed a waiver of the necessity for a remedy of the unfair labor practices that occurred.

There is no exculpatory provision in the Act which permits the commission of unremediable unfair labor practices which occur during any particular period, such as an election campaign. (*Cf.* Section 10(b) of the Act, the six month limitation.)

The November 1968 election, which the Union lost, is the entire predicate of the Company's instant motion. This election result does in no respect mean that the IUE will not, at some permissible date, petition once again and institute another campaign so that it may be elected as the exclusive bargaining representative of the Com-

pany's employees. In these premises, this Court's enforcement of the Board's outstanding order will tend to prevent repetition of the Company's unlawful conduct in future elections. The unfair labor practices that are involved in this case are intrinsically related to and arise out of the exercise of the employees' right to seek representation under the Act. The apparent absence of employer misconduct during the November 1968 election may be explained by the pendency of this enforcement proceeding. However, repetition of the misconduct, which this proceeding seeks to rectify, can only be effectively accomplished by a remedial order and not upon whether or not the Company will respect its employees' statutory rights in one election and violate them in another.

The Company relies on *General Engineering* v. *N.L.R.B.*, 311 F.2d 570 (9th Cir. 1963). This decision declared that an intervening election "makes moot all portions of the order under review which relate to the representation case" and remanded to that part of the Board's order which found certain conduct to have interfered with the free selection by employees of a bargaining representation, in violation of Section 8(a)(1) of the Act.

In *N.L.R.B.* v. *Marsh Supermarkets, Inc.*, 327 F.2d 109 (7th Cir. 1963) that Circuit Court expressly refused to follow the *General Engineering* decision which relied upon the *obitur* comment in *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428, because said comment ". . . beg[s] the question of mootness and [is] concerned with procedure." In *N.L.R.B.* v. *Marsh Supermarkets, Inc.*, *supra* at 111, the Court of Appeals for the Seventh Circuit held:

> "When the Board finds that unfair labor practices have been committed, it is entitled to have its order enforced by the courts to prevent repetition of that unlawful conduct in the future. Neither compliance with the Board's order, N.L.R.B. v. Mexia Textile Mills, Inc., 339 U.S. 563, 567, 70 S.Ct. 833, 94 L.Ed. 1067 (1950), nor a subsequent certification of the union as bargaining representative, N.L.R.B. v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261,

58 S.Ct. 571, 82 L.Ed. 831 (1938), renders the cause moot.

"In a factual situation close to the one at bar, the Second Circuit in N.L.R.B. v. Clark Bros. Co., 163 F.2d 373 (2d Cir. 1947), decided that the holding of a second election, as ordered by the Board, and the certification of an independent association as bargaining representative, did not render moot the question whether the company's conduct in the original election violated the Act. The court said, 163 F.2d at 375, 'The CIO will doubtless continue its organizational efforts and may hereafter petition for another election. If the Court makes no decision as to respondent's former conduct, it may then be repeated; hence a decision as to its legality will not be a futile exercise of jurisdiction.'

"In the case before us if the Board's order is justified, it is entitled to have it enforced as a means of insuring that in future elections the conduct may not be repeated. We conclude the Yorktown questions are not moot."

Like the Seventh Circuit in the *Marsh Supermarkets* case, the Fourth Circuit Court of Appeals (*N.L.R.B.* v. *Metalab-Labcraft, Division of Metalab Equipment Company*, 367 F.2d 471 (4th Cir. 1966)) and the Second Circuit Court of Appeals (*N.L.R.B.* v. *Clark Bros. Co.*, 163 F.2d 373 (2d Cir. 1947)) have also expressed disagreement with the mootness result that was obtained in *General Engineering* case.

In *N.L.R.B.* v. *Metalab-Labcraft, Division of Metalab Equipment Company, supra*, the intervening election resulted in the designation of the union as exclusive bargaining representative. This fact did not induce that Court * to declare moot the unfair labor practices that

* The *General Engineering* mootness conclusion was discussed by the Fourth Circuit Court of Appeals in the *Metalab case*, as follows:

"The ready answer to the charge of mootness is that District 50 may again campaign for selection as the bargaining agent of the employees at some permissible future date and enforce

occurred during the prior election campaign because it was recognized that the unsuccessful union might again institute a future campaign and that the Board's order may serve to prevent a repetition of the unlaw conduct. In this case it will be permissible for the IUE to petition for another election in November of 1969 (Section 9(c)(3) of the Act) as compared to the unsuccessful union in the *Metalab case* which was subject to a contract (or election) bar of as much as three years.

This Court, in *General Engineering*, considered *only* the fact that a new election had been properly held. It did not consider the likelihood that the unsuccessful union in *General Engineering* would be involved in a future attempt to be selected as the exclusive bargaining representative. Here, the IUE is committed to a further election campaign that will commence upon the very heels of this Court's decision. This fact clearly distinguishes the factual basis for the *General Engineering* decision and constitutes a tangible and compelling support for a finding that enforcement of the Board's outstanding order will insure against the repetition of the unlawful Section 8(a)(1) conduct in such subsequent elections that may be conducted.

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ment of the Board's order may serve to prevent a repetition of Metalab's unlawful conduct. This line of reasoning has prompted two other circuits, in cases posing enforcement questions quite similar to the question presented on this appeal, to grant enforcement of Board orders with respect to pre-election unfair labor practice conduct by an employer. NLRB v. Marsh Supermarkets, Inc., 327 F.2d 109 (7 Cir. 1963), cert. denied, 377 U.S. 944, 84 S.Ct. 1351, 12 L.Ed.2d 307 (1964); NLRB v. Clark Bros. Co., 163 F.2d 373 (2 Cir. 1947)."

WHEREFORE, the International Union of Electrical, Radio and Machine Workers, AFL-CIO, respectfully requests that this Court deny the motion to dismiss the proceedings herein on the ground of mootness.

Respectfully submitted,

/s/ Melvin Warshaw
IRVING ABRAMSON
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Attorneys for the International Union of Electrical, Radio and Machine Workers, AFL-CIO

Dated at Washington, D.C.,
January 27, 1969.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

RAYTHEON COMPANY, RESPONDENT

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RAYTHEON COMPANY, INTERVENOR

[February 19, 1969]

On Petition for Enforcement and on Petition to Review an Order of the National Labor Relations Board

Before: CHAMBERS, KOELSCH, and BROWNING, Circuit Judges

PER CURIAM:

The Board found that Raytheon Company, in connection with a representation election at its Sunnyvale, California plant, committed labor practices made unfair by Section 8(a)(1) of the Act. In No. 22572, the Board petitions for enforcement of its ensuing cease and desist order, and in No. 22572A, the International Union of Electrical, Radio and Machine Workers, AFL-CIO, the charging party and intervenor, petitions for a review of the Board's ruling refusing to amend the Complaint.

During oral argument in this court counsel for Raytheon made a suggestion of mootness. With leave of court, Raytheon was permitted to supplement the record and move the dismissal of the proceedings. From the ad-

ditional materials submitted pursuant to such leave, it now appears without contradiction that since these petitions were filed the Board has held a new representation election and certified the result.

Accordingly, on the authority of *General Engineering, Inc.* v. *N.L.R.B.*, 311 F.2d 570 (9th Cir. 1962), Raytheon's motions are granted and the proceedings are dismissed.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

JUDGMENT

Upon Petition to enforce an order of the National Labor Relations Board.

This Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board and on motion of respondent for dismissal of petition to enforce and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the motion to dismiss be and hereby is granted and that the petition to enforce order of the said National Labor Relations Board in this Cause be, and hereby is dismissed.

Filed and entered: February 19, 1969.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RAYTHEON COMPANY, INTERVENOR

JUDGMENT

Upon Petition to Review an order of the National Labor Relations Board.

This Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board and on motion of intervenor for dismissal of petition to review and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the motion to dismiss be and hereby is granted and that the petition to review order of the said National Labor Relations Board in this Cause be, and hereby is dismissed.

Filed and entered: February 19, 1969.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

RAYTHEON COMPANY, RESPONDENT

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RAYTHEON COMPANY, INTERVENOR

Before: CHAMBERS, KOELSCH and BROWNING, Circuit Judges

The panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestion for a rehearing en banc is rejected.

United States Circuit Judges

[filed May 8, 1969]

SUPREME COURT OF THE UNITED STATES

No. 440, October Term, 1969

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, ET AL.

ORDER ALLOWING CERTIORARI. Filed November 10, 1969

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such wit.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 370888 374

In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the instant case.

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Appendix A, *infra*, pp. 8–9) is reported at 408 F. 2d 681. The decision and order of the National Labor Relations Board (Appendix C, *infra*, pp. 11–34) are reported at 160 NLRB 1603.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1969 (Appendix E, *infra*, pp. 37, 38). The Board's timely petition for rehearing and sugges-

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tion for rehearing *en banc* was denied on May 8, 1969 (Appendix B, *infra*, p. 10). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, where the National Labor Relations Board sets aside a representation election because of an employer's unfair labor practices and enters an order barring such conduct in the future, judicial proceedings to enforce that order are rendered moot because a second and valid election, which the union again lost, has been conducted in the interim.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in Appendix D, *infra*, pp. 35–36.

STATEMENT

In the fall of 1964, the International Union of Electrical, Radio and Machine Workers, AFL–CIO,[1] initiated an organizing campaign at the Company's electronics plant in Mountain View, California. During the course of this campaign, employee Carol Alvarado was twice called to the desk of her supervisor, Nicola Krest, and questioned concerning her union activities (App. C, p. 18). Krest also threatened that the advent of the Union would result in stricter discipline (App. C, p. 18).

In furtherance of its campaign against the Union, the Company sent Robert Hennemuth, Vice-President for Industrial Relations, from its Massachusetts head-

[1] The Union intervened in the court of appeals, and thus is a party here.

quarters to talk with the Mountain View employees. On February 2, 1965, just two days before a scheduled Board election, Hennemuth delivered a prepared speech to seven separate groups of employees, assembled on plant premises. Hennemuth stressed that, if the Union came in, negotiations would begin from scratch and, accordingly, that employee benefits might be reduced (App. C, pp. 20–21). Hennemuth also announced an improved grievance procedure (App. C, p. 23).

In the ensuing representation election, a majority of the employees voted against union representation. Based on the Company's pre-election conduct, the Union filed both objections to the election and unfair labor practice charges. On October 19, 1965, an unfair labor practice complaint issued, alleging that the Company's conduct violated Section 8(a)(1) of the Act. The Board sustained the complaint and issued an order requiring the Company to cease and desist from such conduct. The Board also set aside the election. (App. C, pp. 12–14, 27, 31–33.)

After the Board petitioned the court of appeals to enforce the unfair labor practice order, the Company moved to dismiss the proceeding on the ground that another election—which the Union again lost—had meanwhile been held and that this fact rendered the enforcement proceeding moot.[2] On February 19, 1969,

[2] Subsequent to the issuance of the Board's order, the Union agreed to the holding of a second election, but that election was also set aside by the Board because of the Company's further acts of interference. On November 1, 1968, while the enforcement proceeding was pending, there was a third election, which the Union also lost; since no objections were filed, the Board certified the results of this election.

the court of appeals, on the authority of its earlier decision in *General Engineering, Inc.* v. *National Labor Relations Board,* 311 F. 2d 570 (C.A. 9), which involved a similar situation, dismissed the proceeding (App. A, *infra,* pp. 8–9).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below—that the holding of a valid rerun election renders moot a proceeding for enforcement of a Board cease-and-desist order in a related unfair labor practice case—is contrary to principles enunciated by this Court and conflicts with decisions of other courts of appeals. In *National Labor Relations Board* v. *Mexia Textiles Mills, Inc.,* 339 U.S. 563, 567, this Court held that an "employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court." For, as the Court pointed out (*id.* at 567), "[a] Board order imposes a continuing obligation, and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree." Accord, *National Labor Relations Board* v. *Pool Manufacturing Co.,* 339 U.S. 577; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U.S. 261, 271.[3]

[3] Outside the labor field, this Court has in different contexts indicated that a case is moot only where no "cognizable danger of recurrent violation" exists. *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 633. The potential for a recurrence of the Company's anti-union conduct, should further efforts to organize the employees be made, is not entirely speculative. See also, on the general question of mootness, *United States* v. *Trans-Mis-*

Other courts of appeals, faced with the identical situation presented here, have uniformly rejected the claim that a subsequent election renders moot a proceeding for enforcement of a cease-and-desist order relating to employer conduct at the time of an earlier election. As stated in *National Labor Relations Board* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109, 111 (C.A. 7), certiorari denied, 377 U.S. 944, "if the Board's order is justified, it is entitled to have it enforced as a means of insuring that in future elections the conduct may not be repeated." Accord, *National Labor Relations Board* v. *Metalab-Labcraft*, 367 F. 2d 471, 472 (C.A. 4); *National Labor Relations Board* v. *Clark Bros. Co.*, 163 F. 2d 373, 375 (C.A. 2).[4]

2. Considerations of sound policy also favor review by this Court. The Ninth Circuit's position encourages employers who have committed unfair labor practices

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souri Freight Association, 166 U.S. 290, 309; *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43; *Walling* v. *Reuter Co.*, 321 U.S. 671, 673–674; *Federal Trade Commission* v. *Goodyear Co.*, 304 U.S. 257, 260; *Gray* v. *Sanders*, 372 U.S. 368, 375–376.

[4] The position of the Ninth Circuit, as more fully articulated in its opinion in *General Engineering, Inc.*, v. *National Labor Relations Board*, 311 F. 2d 570, 571–572, appears to rest on certain language in *National Labor Relations Board* v. *Jones & Laughlin Steel Co.*, 331 U.S. 416. There this Court stated that "where the order obviously has become moot, the court can deny enforcement without further ado" (331 U.S. at 428). However, the Court was there merely stating a general and somewhat abstract principle. Moreover, since the issue in that case (whether a Board order covering plant guards was rendered moot by the subsequent deputization of those guards by the city) was entirely different from that here, the language there cannot fairly be read as suggesting that a Board order should not be enforced in the present situation.

which interfere with a free election not to comply with the Board's unfair labor practice order. By declining to comply and thereby compelling the Board to institute court enforcement proceedings, the employer can delay the final resolution of the unfair labor practice question for more than a year.[5] Moreover, in that situation the union would be required to choose between (1) awaiting the completion of this lengthy proceeding and thereby risk a further attrition in the employee support which has already been eroded by the employer's unfair labor practices, or (2) participating in another election without the benefit of employer compliance with the Board's order. Should the union select the latter alternative and lose the later election (which, absent new acts of interference by the employer, would be valid[6]), there would be no enforcement of the Board's unfair labor practice order, and the Union would be denied the protection such order would afford it should it subsequently renew its organizational effort and seek another Board election.[7] Instead, when the union renews its organizational effort, the employer, absent a court-enforced Board order, would be free to counter the union's effort by again engaging in the same kinds of unfair labor practices, without the possibility of triggering

[5] During the period July 1, 1967 to June 30, 1968, the median time between the issuance of a Board unfair labor practice order and a decision by the court of appeals was 542 days. In the present case, the period was 28 months.

[6] The Union here went through two elections; the second one was again set aside because of further acts of interference by the Company (see note 2, *supra*).

[7] Section 9(c)(3) permits another election to be held within a year after "a valid election."

a contempt sanction, and thereby start the same cycle over again. In short, the decision below would in effect reward the employer for his non-compliance with the Act and Board orders issued pursuant thereto (cf. *National Labor Relations Board* v. *Gissel Packing Co.*, Nos. 573, *et al.*, 1968 Term, decided June 16, 1969, slip op., p. 33), and would impair the Act's basic policy of encouraging a prompt and fair resolution of representation questions.

3. Finally, the Ninth Circuit, by reaffirming its earlier decision in the *General Engineering* case, has made it plain that its view on this question is a fixed one. Accordingly, unless this Court takes corrective action, the Board will be required to apply a different rule in the area covered by that circuit than it does elsewhere in the country, thereby negating the congressional intention of achieving a uniform national labor policy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
JOHN I. TAYLOR,
Attorney,
National Labor Relations Board.

AUGUST 1969.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 22572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

No. 22572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT, AND RAYTHEON COMPANY, INTERVENOR

(February 19, 1969)

On Petition for Enforcement and on Petition To Review an Order of the National Labor Relations Board

Before: CHAMBERS, KOELSCH, and BROWNING, Circuit Judges

PER CURIAM:

The Board found that Raytheon Company, in connection with a representation election at its Sunnyvale, California plant, committed labor practices made unfair by Section 8(a)(1) of the Act. In No. 22572, the Board petitions for enforcement of its ensuing

cease and desist order, and in No. 22572A, the International Union of Electrical, Radio and Machine Workers, AFL–CIO, the charging party and intervenor, petitions for a review of the Board's ruling refusing to amend the Complaint.

During oral argument in this court counsel for Raytheon made a suggestion of mootness. With leave of court, Raytheon was permitted to supplement the record and move the dismissal of the proceedings. From the additional materials submitted pursuant to such leave, it now appears without contradiction that since these petitions were filed the Board has held a new representation election and certified the result.

Accordingly, on the authority of *General Engineering, Inc.* v. *N.L.R.B.*, 311 F. 2d 570 (9th Cir. 1962), Raytheon's motions are granted and the proceedings are dismissed.

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APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 22572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

No. 22572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT AND RAYTHEON COMPANY, INTERVENOR

Before: CHAMBERS, KOELSCH and BROWNING, Circuit Judges

The panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestion for a rehearing en banc is rejected.

United States Circuit Judges.

APPENDIX C

United States of America Before the National Labor Relations Board

No. 20–CA–3554

RAYTHEON COMPANY

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO

No. 20–RC–6201 [1]

RAYTHEON COMPANY, EMPLOYER

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO, PETITIONER

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On June 13, 1966, Trial Examiner William E. Spencer issued his Decision in the above-entitled consolidated proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in other unfair labor practices alleged in the complaint. In addition, he recommended sustaining certain objections to the elec-

[1] International Brotherhood of Electrical Workers, AFL–CIO, intervened in Case No. 20–RC–6201.

tion held on February 4, 1965, in Case No. 20–RC–6201, and setting aside the election. Thereafter, the Respondent filed a Statement of Exceptions, a "Brief in Support of Exceptions to Intermediate Report; and in Support of Portions of Intermediate Report," and an "Answering Brief to Brief of IUE in Support of Cross-exceptions." The General Counsel filed a Brief in Support of Certain Portions of the Trial Examiner's Decision, cross-exceptions, and a brief in support of its cross-exceptions. International Union of Electrical, Radio & Machine Workers, AFL–CIO, herein called the Charging Party, filed an Answering Brief to Respondent's Brief, cross-exceptions, and a brief in support of its cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified below.[2]

[2] We agree with the Trial Examiner that the Respondent violated Section 8(a)(1) of the Act and interfered with the election by Supervisor Krest's coercive interrogation of employee Alvarado, and Vice President Hemmemuth's coercive speeches to the employees. We also find, contrary to the Trial Examiner, that the announcement of new grievance procedures, in such speeches, constituted further violation of Section 8(a)(1) and further interference with the election. However, we find it unnecessary to, and therefore do not, rely on the Trial Examiner's finding of additional grounds for setting

ORDER

Pursuant to Section 10(c) of the National Relations Labor Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, Raytheon Company, Mountain View, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified.

1. Add the following at the end of paragraph 1(a): "and promising new benefits as an inducement to employees not to engage in union activity."

2. Delete paragraph 1(b) and substitute the following: "In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist in any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in section 7 of the Act, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959."

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aside the election. There is no merit in the Charging Party's exception to the Trial Examiner's denial of its motion, made at the hearing, to amend the complaint to allege additional threats and promises of benefit. See *Local 1474-1, Pipe Coverers, International Longshoremen's Association (J. Q. H. Insulating Co., Inc., et al.)*, 147 NLRB 90, 93, footnote 4. Cf. *Automobile Workers* v. *Scofield*, 382 U.S. 205, 219, footnote 14.

(3) In the Notice attached to Trial Examiner's Decision, add the following at the end of the first indented paragraph: "nor will we promise new benefits as an inducement to employees not to engage in union activity."

(4) Delete from the Notice the second indented paragraph, and substitute the following: "We will not interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959."

(5) Delete from the Notice the last paragraph.

It is further ordered that the complaint, insofar as it alleges unfair labor practices not found herein be, and it hereby is, dismissed.

It is further ordered that the election held on February 4, 1965, among the Respondent's employees be, and it hereby is, set aside, and that Case No. 20–RC–6201 be remanded to the Regional Director for Region 20 for the purpose of conducting a new election at such time as he deems that circumstances permit the free choice of a bargaining representative.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the appropriate unit at such time as the Regional Director for Region 20 deems appropriate. The Regional Director shall direct and supervise the election, subject to National Labor Relations Board Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective-bargaining purposes by International Union of Electrical, Radio & Machine Workers, AFL-CIO; by Interna-

tional Brotherhood of Electrical Workers, AFL–CIO; or by neither.

Dated, Washington, D.C., Oct. 5, 1966.

FRANK W. MCCULLOCH, *Chairman,*
GERALD A. BROWN, *Member,*
SAM ZAGORIA, *Member,*
[SEAL] *National Labor Relations Board.*

United States of America Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California

No. 20–CA–3554

RAYTHEON COMPANY

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO

No. 20–RC–6201

RAYTHEON COMPANY, EMPLOYER

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO, PETITIONER, AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO

Barry Jellison, Esq., and *Morton H. Orenstein, Esq.,* for the General Counsel.

Robert L. Molinar, Esq., and *Selig A. Saltzman, Esq.,* Lexington, Mass., for the respondent.

Marilyn G. Rose, Washington, D.C., for the charging party and petitioner.

Before: WILLIAM E. SPENCER, Trial Examiner

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

The complaint proceeding in this case, brought under Section 10(b) of the National Labor Relations Act as amended (61 Stat. 136; 73 Stat. 519), hereinafter the Act, consolidated for hearing with objections to an election filed by the charging party and petitioner herein in Case No. 20–RC–6201, was heard in San Francisco, California, on January 19, 20, 1966, pursuant to due notice.

The complaint, issued 19 October, 1965 upon a charge filed April 6, 1965, and an amended charge filed October 15, 1965, alleged various conduct engaged in by the Respondent as violative of Section 8(a)(1) of the Act, conduct incorporated in the objections to the election with some additional matters.

The Respondent in its duly filed answer denied the said allegations. Upon the entire record in the case, consideration of briefs filed with me by each of the parties, and from my observation of witnesses, I make the following:

FINDINGS OF FACT

I. The Business of the Respondent and Employer

Raytheon Company, a Delaware corporation, is engaged, among other things, in the design, development and manufacture of semiconductor products and solid state devices. It has facilities located in several States, including Massachusetts and California. Its Mountain View, California plant is the locale of matters giving rise to this proceeding.

During the past year Respondent shipped products valued in excess of $50,000 from its California operations directly to customers outside the State.

II. The Labor Organization Involved

International Union of Electrical, Radio & Machine Workers, AFL–CIO, hereinafter the Union or IUE, is a labor organization within the meaning of the Act.

III. The Unfair Labor Practices

1. *The factual situation; issues*

Pursuant to a representation petition filed by IUE on January 4, 1965, an election among the production and maintenance employees of Respondent's Mountain View, California plant, was conducted by the Board on February 4. The results were that 161 votes were cast for the IUE, 54 for IBEW, an intervenor, and 301 for no union. On February 11, IUE filed a petition to set aside the election and on April 6, the charge of unfair labor practices which initiated the present complaint proceeding. The issue, broadly stated, is whether Respondent by a series of speeches addressed to its employees on February 2 in a captive audience atmosphere, and by various other statements and conduct, violated Section 8(a)(1) of the Act, and by these alleged statements and conduct, and other matters alleged in the objections to the election, interfered with the free choice of its employees to a degree requiring that the election be set aside.

2. *The Krest-Alvarado incident*

In the week or so preceding the February 4 election, Employee Carol Alvarado was twice called to the desk of Nicola Krest, supervisor of the department in which she worked, and questioned concerning her union activities. Alvarado on these occasions was

wearing an IUE badge indicating her support of that union, the only person in her department of some twenty employees that she observed wearing an IUE badge. Krest asked Alvarado why she wanted a union, and when the latter replied that she thought a union could provide employees with a better vacation and sick leave plan and higher wages, Krest replied that it would be impossible for the employees to achieve such additional benefits; that he had not complained to the employees on their work standards, but with a union certain work standards would be set and any employee not meeting them could be discharged; that if the Union was voted in, any employee who was late to work on more than three occasions would be discharged. On the second occasion Krest asked Alvarado if she had attended an IBEW meeting and if so, why. The foregoing is Alvarado's version of the two conversations.

Krest admitted that the conversations occurred; testified in substance that on the occasion of the first conservation he called Alvarado to his desk with respect to her requested transfer out of his department, and that Alvarado initiated the topic of unions by saying that if the employees had a union "things like this [the refusal of a transfer] wouldn't happen." Krest testified, "From that point on, we discussed several things about the union," and, in amplification, mentioned the topics of seniority and work standards. On the latter he testified, "I said that I am quite sure that if a union did come into the plant that the union, if they weren't satisfied with the standards which we had on the jobs, would bring in their own industrial engineers. I felt that if they found that our standard was extremely low, they would raise it, you know, if they thought it was completely out of the picture." Krest did not recall if the union was discussed in his second conversation with Alvarado which was concerned

primarily, as was the first, with her request for a transfer.

I find, in sum, that Foreman Krest questioned Alvarado concerning her union activities, interrogated her concerning her desire for union representation, and stated, in substance and effect, that she stood to lose rather than gain through union representation in the matter of work standards, and would be unable to obtain the benefits she sought. His remarks took on added emphasis and significance when Robert G. Hennemuth, a company official, later addressed the employees on the same general topic of what union representation would mean to them.

3. *The February 2 Hennemuth speeches*

In its captive audience speeches, delivered successively to seven groups of its employees on February 2, the Respondent, through its industrial relations vice-president, Robert G. Hennemuth, counseled its employees to reject union representation. As urged in Respondent's brief, Hennemuth, though unequivocally partisan in his language, made his "pitch" without rancor and in an atmosphere which was undoubtedly calculated to, and did in fact convey the appearance of friendly counsel. At the close of his speech, there would be a period of questions from the floor responded to in good humor by Hennemuth; and other instances of good-humored give-and-take. Nevertheless, Hennemuth made it clear in the introduction to his remarks that he was a top figure in Respondent's heirarchy of officers and therefore spoke with authority, and frequently referred to the "legal" posture of his remarks. The body of his speeches was tape-recorded and transcriptions from the tapes were received in evidence. There were portions of his speech,

however, which were not recorded, and therefore the transcriptions were not necessarily a refutation of the testimony of employees who heard the speeches. The latter, except for variations in emphasis, were not markedly at variance with the recorded portions of the speeches.

Hennemuth's speeches were organized and delievered under four major points or topics, and these will be alluded to seriatum.

First, Hennemuth stressed the importance of all employees voting and the secrecy of the ballot which would protect employees in voting against union representation even though they had signed one or more union authorization cards. "Regardless of whether you signed for one or both, that is not binding on you. * * * When you engage in this voting process on Thursday you are a free person."

Hennemuth's second point, and one that received the greatest emphasis and undoubtedly took precedence over others in the minds of the employees, was that if the employees chose union representation, negotiations on a contract would follow; that such negotiations would start from scratch and the employees could end up losing some of their present benefits;[1]

[1] Excerpts from Hennemuth's speeches: "* * * in a negotiation they [the employees] had to understand that legally the Company and the Union start from scratch * * * what happens in negotiation is that two parties sit down to negotiate and they start fresh—just as though nothing's on the table * * * in negotiations they have to get up to where you are—where the company is, first—before you even get any more." [This point was given added emphasis by a leaflet passed out by Respondent to its employees on January 14, 1965, which stated in part: "When a union comes into a plant, collective bargaining begins not at the present wage level, but at *zero* * * *"] In negotia-

that a union could not guarantee them anything but could gain for them only such benefits as the company would grant;[2] that a union's only weapon for enforcing bargaining demands was the strike and that a strike would impose hardships on the employees who engaged in it.[3] Hennemuth told the employees, "My

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tions an employer might say, "Look, we are sick and tired of paying nine holidays and now we are only going to agree to five."

Further, on the combined credited and undisputed testimony of General Counsel's witnesses, Alvarado, Hudson, Lott and Carpenter, Hennemuth said that while employee insurance was now "free" if the Union won this benefit would have to be negotiated from scratch and the employees might end up having to pay for what they presently were getting free; gave a specific example of a company which took away bus fare formerly given its employees as a fringe benefit, when a union came into the plant; and said they they should not be misled by thinking that the benefits they presently had would necessarily continue if the Union came into the plant.

[2] Excerpt from Hennemuth's speeches: "* * * you should bear in mine that a union cannot guarantee you anything. Now I'm telling you, legally if I may in this sense, because if a union wins the right with any company to represent the employees involved, a period of negotiation must follow after that point and there comes into being between the union and the company after that *only what the company wants to agree to* * * *" [Emphasis supplied].

[3] Excerpts from Hennemuth's speeches: "So let's suppose that the company doesn't want to agree—what recourse does the union have? The only recourse is to strike * * * I'm sure you all have had some exposure to what a strike can mean. It's a harsh thing, it is a weapon that in my opinion personally is not a terribly useful thing to the unions because it imposes such a hardship on the people who are members of the unions. They go without pay during the entire period of the strike. Now sometimes there is a 'strike fund' a union may have but this is usually inadequate and then it usually often doesn't last except for a couple of weeks and it requires you to go out and do

suggestion to you is that working for this company under the circumstances as I know them at least, I feel you don't need that kind of representation because I really feel that compared to other American citizens across the country working for a number of different companies, you don't look too bad at all, really, as far as your benefits are concerned," that in the light of all these circumstances the employees should carefully evaluate the Union's claims put forth in its election propaganda because "you will not get anything more from this company with a union than you would get without a union and in the meantime you are going to be paying out $40 to $50 a year and perhaps more."

Hennemuth's third point consisted largely of a review of Respondent's wage structure and fringe benefits and comparisons with other plants operating under union contracts; a statement of Respondent's grievance procedure characterized as a "darn firm open door policy" on the part of its local manager, Fred Wills, and a promise that in the future this procedure would be further liberalized by permitting any aggrieved employee who was not satisfied with the response of the local office to appeal directly to Hennemuth in Respondent's main office; and an elaborate defense of Respondent's existing sick leave policy: "So bear in mind, that even if a union does come on these premises as a result of Thursday, that does not mean any such union will get paid sick leave. And I'm saying to you right now, it won't. This is not because we don't think it's a desirable benefit * * * We are just not ready to put in that kind of an ex-

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picket line duty, and so forth. Now, this might be all right in its place, understand. My suggestion to you is, that working for this company under the circumstances as I know them at least I feel you don't need that kind of representation, etc."

pense in our fringe benefit package at this time, especially where we are now convinced that we already have a package that is as good as any you will find in industry generally." In this connection, Hennemuth told the employees that "no unionized plant in Raytheon has paid sick leave either." In summing up, Hennemuth told the employees, "So again, repeating the third thought I want to leave with you, without paying any of these costs that are union-involved, you already have a whole good series of kinds of compensation which once again I am satisfied would not have been any better even if you had had a union here and in the future it won't be any better just because a union is on the premises."

Hennemuth's "fourth and final" point was in substance an appeal to the loyalty of the employees. Coupled with this was the statement that in the three years that Respondent had operated its Mountain View plant, with an outlay of millions, it had "never taken one lick of profit out of here." Followed a discussion of the company's "continuing determination to make a go of this place," and a final appeal, "So this is why I say to you that Raytheon in these three years has never given up on you. You know, we've had some rough sledding and we are asking you, please, to continue to work with us as a team. Give Mr. Wills the opportunity to make a profitable venture out of this and do it, please, without the intervention of some unnecessary outsider who can cause trouble by harrassment [sic], who can take money away from you, and who we are convinced is not going to bring you anything in return that you wouldn't get otherwise."

4. Concluding findings

While the Act provides that an employer's failure or refusal to agree to a union's proposals does not in and of itself constitute a refusal to bargain in good faith, this by no means licenses any employer to enter into bargaining negotiations with a mind closed against extending or varying existing employee benefits. An employer who tells his employees that they can gain through union representation only what he, the employer, unilaterally *chooses* to give them, and that they will gain no additional benefits through bargaining but stand to lose benefits already enjoyed, is not merely predicting what may be the ultimate results of collective bargaining, or stating mere possibilities, but is making flat statements of a pre-determined position on bargainable issues and is therefore voicing a rejection of the bargaining principle. What could be more illustrative of such a state of mind than Hennemuth's statement to the employees with respect to sick leave, an issue which obviously was a campaign issue: "So bear in mind, that even if a union does come on these premises as a result of Thursday [the election], that does not mean any such union will get paid sick leave. *And I'm saying to you right now, it won't,*" [emphasis supplied] and his further statement, "So again, repeating the third thought I want to leave with you, without paying any of these costs that are union-involved, you already have a whole good series of kinds of compensation which once again I am satisfied would not have been any better even if you had had a union here *and in the future it won't be any better just because a union is on the premises.*" [Emphasis supplied.] The impact of these and kindred statements on the employees' minds is neither negatived nor neutralized by an occasional reference to the

employees' freedom of choice and Respondent's intention to deal with them in good faith, regardless of the outcome of the election. As a matter of fact, in all the Hennemuth speeches there is not a single unequivocal statement that if the employees choose union representation the Respondent will enter into negotiations with an open mind on bargaining issues and will attempt, in good faith, to reach an agreement satisfactory to both the employer and the employees—essential elements of good faith bargaining. In the same category is Hennemuth's statement that in talking to the employees he was walking a tightrope since he could neither offer benefits nor threaten reprisals in the matter of their choice of union representation, in a context in which he was instilling fear into their minds that union representation though costly would be futile, and that a union's only recourse in obtaining for the employees anything that Respondent did not choose to give, was the strike with the attendant hardships that would be visited on the employees in such event. In sum, for all their carefully contrived appearance of amiability, the Hennemuth speeches were larded with statements which amount to an anticipatory refusal to bargain and as such were poorly concealed threats to deprive Respondent's employees of any and all benefits to be derived from the exercise of the right to collective bargaining through representatives of their own choosing. Supervisor Krest's interrogations of Alvarado about her union activities and statements that she could not gain but would lose through union representation, though minor in comparison, are not properly considered as isolated statements of a minor supervisor, but as a part of Respondent's general plan of coercion as fully demonstrated in the Hennemuth speeches.

I find that the Respondent through Krest's anti-union statements and interrogation of Alvarado and, in major part, through the Hennemuth speeches, interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, thereby engaging in conduct violative of Section 8(a)(1) of the Act.[4]

[4] Hennemuth's statement that employees might address him directly in Respondent's eastern office with respect to grievances, is alleged to constitute an unlawful inducement, and while undoubtedly it was made to court favor with the employees, I am unable to view it as substantial enough to constitute a violation of Section 8(a)(1). Employees would have to be naive indeed to believe that Hennemuth in Respondent's eastern office would seriously entertain an individual grievance arising in the Mountain View plant already weighed and rejected by the local plant manager, and in any event a disgruntled employee could always avail himself of the freedom of the mails to address officials in the eastern office. I am also unable to view increased wages and benefits extended employees in September, 1965, some six months after the election, as a reward for the employees' rejection of union representation. In extending these benefits Respondent did compliment the employees on their "loyalty" but reference was also made to increased production. The matter is not entirely free from doubt due to the rather gloomy profit-and-loss picture given the employees by Hennemuth in February prior to the election, but I do not find a preponderance of evidence supporting an unlawful motive. Respondent's interrogation of Employees Shirley Ball and Katherine Lott through its counsel, Robert L. Molinar and Selig A. Saltzman, alleged to constitute unlawful interference with General Counsel's witnesses, has flimsy support in the testimony of Ball and Lott except that it does appear that they were asked if they had been interviewed by Board agents, and the latter was questioned about future appointments, if any, with such agents. The interviews appear to have been centered on the employees' recollection of Hennemuth's speech; the employees do not appear to have been questioned concerning the substance of their interviews with Board agents;

Ball testified that Molinar told her not to worry about being subpoenaed to testify, "just to come in and tell the truth" as best she could, and if questioned by Board agents to tell them that she had been interviewed by the company lawyers; Lott admitted that at the start of the interview Molinar told her she was free to answer questions or not as she saw fit. While I believe it was improper for Respondent's counsel to question these employees concerning their meetings with Board agents preparatory to testifying, and it is clear that such interrogations were in no way necessary or material to the preparation of a defense, the coercive element appears to have been slight if not altogether non-existent.

IV. Objections to the Conduct of the Election

Pursuant to a stipulation for certification upon a consent election executed by the parties on January 14, 1965, an election was conducted among Respondent's employees on February 4. On February 11, the petitioner herein filed timely objections to the conduct of the election. On June 2, the Board's Regional Director issued and served on the parties his report on objections, in which he recommended to the Board that the objections be consolidated for hearing with the complaint herein. On June 23, the Employer filed timely exceptions to the report and to the Regional Director's recommendation on the consolidation of cases. The matter was referred to the Board and on August 10, the Board found the exceptions without merit and ordered the hearing herein.

On all the evidence before me I find the objections to the conduct of the election well taken and shall recommend that the election of February 4 be set aside.

As set forth in detail in the preceding section of this report, the employer in seven speeches addressed to groups of employees sought to convince them that they should reject union representation. Only one day intervened between these speeches and the election.

The petitioner requested permission to address the employees in similar fashion and the request was ignored. The employer's rule against "selling, soliciting, canvassing or distributing without prior management approval," effectively foreclosed the petitioner from presenting its claims and arguments to employees while they were on company premises. It issued numerous pamphlets but for their distribution had to rely on passing them out to employees on their entering or leaving company premises, mailing them to the employees' homes, or passing them out at union meetings. With respect to the first, many of the employees lived in geographical areas removed by miles from the plant, and therefore substantial numbers drove to and from work, about 95 percent according to estimates. The petitioner being barred from the company's parking lot, had to rely on reaching these employees as they were driving in and out of the lot. As to mailing, the petitioner had to ascertain the mailing address of the employees "by word of mouth" and as a result could reach only a small percentage of the total employment. Its meetings, according to its representatives, were attended largely by those who were highly partisan on behalf of the Union or who vigorously opposed it, and therefore the Union was unable to reach those who were neutral or not yet convinced one way or the other. Also, inasmuch as the plant was operating on three shifts, and meetings during the work week normally would follow at the end of a shift, obviously the hours were not propitious for drawing large numbers to the meetings.[5]

In short, on the facts of this case it is clear that through Respondent's restrictive rule on solicitations

[5] For instance open meetings for employees on the swing shift would start at 1 a.m.

and because of other circumstances noted above, the employees were effectively barred from anything approaching an equal or comparable opportunity for hearing arguments favoring union representation, or contesting and refuting the propaganda literature and the captive audience speeches of the Employer. For this reason alone I would hold that the employees were denied the freedom of choice such as would have been theirs—and to which I think they were entitled—had they been afforded at least a reasonable approximation of equal access to the copious representations made by both proponents and opponents of union representation. It is on the basis of these findings, and interference violative of Section 8(a)(1) of the Act as found in Section III above, that I recommend that the election of February 4, 1965 be set aside.[6]

Upon the basis of the foregoing findings of fact and upon the entire record in the case I make the following:

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[6] I agree with petitioner that coercive conduct engaged in by General Foreman Burke and Foreman Blackburn with respect to employees wearing IUE badges, not alleged as constituting unfair labor practices and occurring prior to a representation petition being filed, may nevertheless be considered as background to conduct in issue, such as Krest's interrogation of Alvarado and the Hennemuth speeches, and when so considered tends to place the remarks of Krest, but more particularly Hennemuth, in their true perspective, since the few intervening months would not have sufficed to erase from the minds of affected employees fears of reprisal stemming from the Burke-Blackburn interrogations and threats. However, the exclusion from consideration of such background matters would leave, unaltered, the conclusions expressed in the text above.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2 (6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2 (6) and (7) of the Act.

4. Respondent's conduct as found in Sections III and IV, *supra*, improperly affected the results of the election of February 4, 1965.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices I shall recommend that it cease and desist therefrom and that it take certain affirmative action to remedy and to remove the effects of the unfair labor practices and to effectuate the policies of the Act.

As I have found that Respondent's conduct improperly affected the results of the election I shall recommend that the election be set aside.

RECOMMENDED ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the Act, it is recommended that the Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees in an unlawful manner concerning their union activities; threatening or implying a loss of existing benefits in the event they choose union representation; threatening or implying an anticipatory refusal to bargain on bargainable issues, such as sick leave, in such event.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action:

(a) Post in its Mountain View, California, plant copies of the notice attached hereto marked "Appendix A."[7] Copies of said notice to be furnished by the Regional Director for the Twentieth Region shall, after being signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the Regional Director for the Twentieth Region in writing within 20 days from the date of the

[7] If these Recommendations are adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Examiner" in the notice. If the Board's Order is enforced by a decree of the United States Court of Appeals, the notice will be further amended by the substitution of the words "A Decree of the United States Court of Appeals Enforcing an Order" for the words "A Decision and Order."

receipt of this Decision what steps Respondent has taken to comply herewith.[8]

It is further recommended that the election which was conducted on February 4, 1965, be set aside.

Dated: June 13, 1966.

WILLIAM E. SPENCER, *Trial Examiner.*

Notice to All Employees Pursuant to The Recommendations of a Trial Examiner of The National Labor Relations Board And in Order to Effectuate The Policies of The National Labor Relations Act (as Amended)

We hereby notify our employees that:

We will not interrogate our employees in an unlawful manner concerning their union affiliation and activities; interfere with their freedom of choice with respect to union representation by stating or implying a loss of existing benefits in the event they choose union representation; stating or implying an anticipatory refusal to bargain in good faith on bargainable issues in such event.

We will not in any like or related manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form, join or assist International Union of Electrical, Radio & Machine Workers, AFL–CIO, or any other labor organization, to bargain collectively through representatives of their own choosing or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

[8] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Twentieth Region in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

We will, on request, bargain in good faith on bargainable issues, including sick leave, in the event our employees designate the above-named union or any other labor organization, their bargaining representative.

RAYTHEON COMPANY, *Employer.*

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 450 Golden Gate Avenue, Box 36047, San Francisco, California, 94102 (Telephone No. 556-0335)

APPENDIX D

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guarantee in section 7; * * *

* * * * *

Sec. 10(c) The testimony taken by such member, agent, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in

the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

APPENDIX E

United States Court of Appeals for the Ninth Circuit

No. 22572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

Judgment

Upon Petition to enforce an order of the National Labor Relations Board.

This Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board and on motion of respondent for dismissal of petition to enforce and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the motion to dismiss be and hereby is granted and that the petition to enforce order of the said National Labor Relations Board in this Cause be, and hereby is dismissed.

Filed and entered: February 19, 1969.

United States Court of Appeals for the Ninth Circuit

No. 22572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT, and RAYTHEON COMPANY, INTERVENOR

Judgment

Upon Petition to Review an order of the National Labor Relations Board.

This Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board and on motion of intervenor for dismissal of petition to review and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the motion to dismiss be and hereby is granted and that the petition to review order of the said National Labor Relations Board in this Cause be, and hereby is dismissed.

Filed and entered: February 9, 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

In the Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 440.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
RAYTHEON COMPANY ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF RAYTHEON COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Question Presented.

Whether the Court of Appeals acted within its authority in determining on the basis of the record before it that a petition for enforcement of a National Labor Relations Board order had been rendered moot.

Statement.

In a routine representation proceeding involving a unit of production and maintenance employees at Raytheon Company's plant at Mountain View, California, identified

on the records of the National Labor Relations Board as Case No. 20-RC-6201, the Board held three elections between February, 1965, and November 1, 1968. All three elections were lost by the Union. Subsequent to the first election, the Union filed unfair labor practice charges and objections to Raytheon's preelection conduct. The unfair labor practice proceeding, identified on the records of the Board as Case No. 20-CA-3554, was consolidated for hearing with the objections to preelection conduct in Case No. 20-RC-6201 (Petition Appendix C, p. 17). As noted in its brief, the Board found that certain preelection conduct not only constituted grounds for setting aside the first election, but also required entry of a finding of violation of section 8(a)(1) of the National Labor Relations Act and issued the usual order (Petition Appendix C, pp. 11-16).[1] While the Board's petition for enforcement of its order in Case No. 20-CA-3554 was pending in the Court of Appeals for the Ninth Circuit, the Board conducted a third election in Case No. 20-RC-6201 and certified the results thereof.

The merits of the Board's unfair labor practice findings, which are not before this Court on the Board's petition, were thoroughly briefed and orally argued by all parties in the Court of Appeals, Raytheon contending that the alleged statements upon which the unfair labor practice findings were based were a proper exercise of the right of free speech guaranteed by section 8(c) of the Act and the First Amendment to the United States Constitution. During oral argument, counsel for Raytheon made a suggestion of mootness in view of the fact that a certified election had been held while the unfair labor practice proceeding was pending in the Court of Appeals. With leave of court, Ray-

[1] As the merits of the unfair labor practice issues are not before this Court, the Hennemuth speeches and "Krest-Alvarado" incident will not be discussed in detail herein but Raytheon does not agree with the characterization of this conduct in the petition.

theon was permitted to supplement the record and move the dismissal of the proceedings. This motion was granted and the proceedings, including the Board's petition for enforcement, were dismissed (Petition Appendix A, pp. 8-9).

The Reasons for Denying the Writ.

The petition for a writ of certiorari and the decision of the lower court in this case present no issues warranting review by this Court. The Board's petition for enforcement was properly addressed to the discretion of the court below which "shall have power to . . . make and enter . . . a decree enforcing, modifying . . . or setting aside in whole or in part the order of the Board." 29 U.S.C. § 160(e). In granting the foregoing power, Congress charged the Courts of Appeals with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498. The statute provides further that the judgment and decree of the Court of Appeals shall be final except for review by this Court upon writ of certiorari. Certiorari is granted only "in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393.

The instant case involves neither an important question of national labor relations policy nor a real and embarrassing conflict of opinion and authority between courts of appeals. The court below was presented with a routine petition for enforcement of a Board order arising from its

finding that respondent had committed two violations of section 8(a)(1) in connection with a representation election. In dismissing the proceedings the court had before it a complete record, including briefs and oral arguments on the merits, supplemented by undisputed materials submitted by respondent. In effect, the court concluded on the basis of the facts in the record before it that it was not necessary to decide the merits of the substantive issues relating to the alleged unfair labor practice. This decision was well within the discretion of the Court of Appeals, the forum vested with primary responsibility for reviewing Labor Board orders and should not be reviewed here merely because this Court, if required to decide the motion to dismiss in the first instance, might have reached a different conclusion. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, *Federal Trade Commission* v. *American Tobacco Co.*, 274 U.S. 543.

The decision of the Court of Appeals does not conflict with *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, and *National Labor Relations Board* v. *Pool Manufacturing Co.*, 339 U.S. 577, two refusal-to-bargain cases, which enunciate the general proposition that compliance with Board orders does not render the order moot. Similarly, *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, the principal holding of which was the propriety of a Board order requiring an employer to withdraw recognition from an unlawfully dominated labor union, does not involve review by this Court of the authority of a court of appeals to dismiss a petition on the basis of the facts in the record before it.

Viewing the decision of the court below as an exercise of its discretion in dismissing a petition for enforcement on the basis of particular facts, there is not a "real and em-

barrassing conflict of opinion and authority between the courts of appeal." The three cases cited by the Board in its petition for certiorari involved the exercise of discretion by other circuits under essentially different facts and circumstances. In *National Labor Relations Board* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109 (C.A. 7), cert. den. 377 U.S. 944, the Board was seeking enforcement of section 8(a)(1) and 8(a)(3) violations committed in two separate bargaining units. Although respondent therein argued that a finding of a section 8(a)(1) violation based on a preelection speech was moot due to a subsequent certification, the Board's order was also based upon the fact that the same speech had been given to employees who were not affected by the second election. See *Marsh Supermarkets, Inc.*, 140 N.L.R.B. No. 83, 52 L.R.R.M. 1134 (1963). Consequently, it was necessary in any event for the Court to determine the merits of the substantive issues as to the validity of the speech.

In both *National Labor Relations Board* v. *Metalab-Labcraft*, 367 F. 2d 471 (C.A. 4), and *National Labor Relations Board* v. *Clark Bros. Co.*, 163 F. 2d 373 (C.A. 2), the question of mootness had been argued before the Board and in each case the court agreed with the Board that enforcement should be granted. *Metalab* involved not only section 8(a)(1) violations which were committed so early in the organizing drive that they may not have been as closely related to the representation election as were the alleged 8(a)(1) violations in the instant case but also involved 8(a)(3) violations. In *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (C.A. 9), the Ninth Circuit considered as moot only certain 8(a)(1) violations closely related to the representation election, as in *Metalab*, the 8(a)(3) violations were considered on the merits as was an 8(a)(1) violation not so closely connected

to the representation election. The *Clark Bros.* case involved unfair labor practices directed on a broad scale to preventing exercise by employees of their right to organize and of a much more substantial nature than those involved in the instant case.

Basically, the question before the Court of Appeals is comparable to that presented by a request for issuance of a declaratory judgment—"whether the facts alleged, *under all the circumstances,* show that there is a substantial controversy, between the parties having adverse legal interests of sufficient immediacy and reality" to warrant the issuance of an enforcement order. (Emphasis supplied.) See *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270, 273. In the instant case the Court of Appeals with the complete record before it was charged with the responsibility of determining under all the circumstances whether the Board's order should be enforced. There are facts in the record to support a conclusion of the Court that the alleged unfair labor practice violations were so indigenous to the particular election campaign and of such a marginal nature as to render determination of the merits of the Board's findings inappropriate. For example, the Court could have found that on the basis of the record the statements made were so closely related to the specific circumstances of this particular representation proceeding that, the proceeding being closed, the purpose of the Act would not be effectuated by enforcing the Board's order, even if the Board's position was sustained on its merits. In reaching such a decision in each case the Court could properly apply to the facts in the particular case such policy considerations as those raised in Point 2 of the Board's argument in the petition. The Court of Appeals having reached this decision on the facts of this case, its discretion under these circumstances is necessarily broad and a strong

showing of abuse must be made to reverse it. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498; cf. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633.

The practical effect of the Board's position is to limit substantially the discretion of courts of appeals in reviewing Board decisions under the Act. The Board is requesting that this Court instruct the Court of Appeals that in the future it is not to consider the particular facts in cases of this type but must follow a rigid rule to be applied mechanically in all cases.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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ALFRED C. PHILLIPS,
Of Counsel.

September, 1969.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 440

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (A. 48–49) is reported at 408 F. 2d 681. The decision and order of the National Labor Relations Board (A. 3–24) are reported at 160 NLRB 1603.

JURISDICTION

The judgment of the court of appeals dismissing the Board's petition for enforcement was entered on February 19, 1969 (A. 49). The Board's timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 8, 1969 (A. 51). The petition for a writ of certiorari was filed on August 6, 1969, and was granted on November 10, 1969 (A. 52). The

jurisdiction of this Court rests on 28 U.S.C. 1254(1), and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 16–18.

QUESTION PRESENTED

Whether, where the National Labor Relations Board sets aside a representation election because of an employer's unfair labor practices and enters an order barring such conduct in the future, judicial proceedings to enforce that order are rendered moot because an additional, valid election, which the union again lost, has been conducted in the interim.

STATEMENT

In the fall of 1964, the International Union of Electrical, Radio and Machine Workers, AFL–CIO,[1] initiated an organizing campaign among the production and maintenance employees at the Company's electronics plant in Mountain View, California. There were over 500 employees in the unit which the Union sought to organize; they worked on three shifts, and many lived some miles from the plant. (A. 10, 18–19.) In January 1965, the Union filed a petition for a Board representation election, which was scheduled for February 4, 1965 (A. 9–10).

[1] The Union intervened in the court of appeals, and thus is a party here.

During the week before the election, employee Carol Alvarado was twice called to the desk of her supervisor, Nicola Krest, and questioned about her union activities. Krest threatened that the advent of the Union would result in stricter discipline (A. 10–11). The Company also sent Robert Hennemuth, Vice-president for Industrial Relations, from its Massachusetts headquarters to talk with the Mountain View employees. On February 2, just two days before the Board election, Hennemuth delivered a prepared speech to seven separate groups of employees, assembled on plant premises. Hennemuth stressed that, if the Union came in, negotiations would begin from scratch and thus that employee benefits might be reduced (A. 11–15). With respect to paid sick leave, a major campaign issue, Hennemuth told the employees that, "even if a union does come on these premises as a result of Thursday [election day] that does not mean any such union will get paid sick leave. And I'm saying to you right now, it won't" (A. 14). Hennemuth also announced an improved grievance procedure (A. 4, n. 2).

The Union lost the election,[2] and thereafter filed both objections to the election and unfair labor practice charges based on the Company's preelection conduct. On October 19, 1965, an unfair labor practice complaint issued, alleging that the Company's conduct had restrained and coerced the employees, in violation

[2] 161 votes were cast for the Union, 54 for the International Brotherhood of Electrical Workers, which had intervened in the proceeding and was also on the ballot, and 301 for no union (A. 10).

of Section 8(a)(1) of the Act. The unfair labor practice proceeding was consolidated with the objections to the election proceeding (A. 10, 18). In October, 1966, the Board, adopting in substantial part the findings of its Trial Examiner, concluded that the Company had violated Section 8(a)(1) and interfered with a free election in that Supervisor Krest's interrogation of employee Alvarado was coercive, Vice-president Hennemuth's speeches to the employees threatened a loss of existing benefits and a refusal to bargain with a union, and his announcement of a new grievance procedure constituted a promise of benefit. (A. 4, n. 2, 17). The Board ordered the Company to cease and desist from:

> (a) Interrogating its employees in an unlawful manner concerning their union activities; threatening or implying a loss of existing benefits in the event they choose union representation; threatening or implying an anticipatory refusal to bargain on bargainable issues, such as sick leave, in such event; and promising new benefits as an inducement to employees not to engage in union activity. [A. 21, 5.]
>
> (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act * * *. [A. 5.]

The Company also was ordered to post notices in its plant for a period of 60 days, advising the employees of the terms of the Board's order and of the Company's intention to abide thereby (A. 5–6, 21). Additionally, the Board set aside the election and directed that a new one be held at such time as its Regional Director deemed appropriate (A. 6–7).

On February 8, 1968, pursuant to Section 10(e) of the Act, the Board petitioned the court of appeals to enforce its unfair labor practice order (A. 25–26). The Company moved to dismiss the proceeding on the ground that it had become moot when the Union lost two other elections which had meanwhile been held (A. 29–31). The first of these was held on June 23, 1967; the Union lost by a vote of 418 to 312, but the Board set the election aside because of the Company's further acts of interference. The final election was held on November 1, 1968, while the enforcement proceeding was pending; the Union lost by a vote of 258 to 204, and, since no objections were filed, the Board certified the results of this election (A. 30–31, 32–34). Both the Board and the Union filed oppositions to the Company's motion (A. 37–40, 41–47). On February 19, 1969, the court of appeals dismissed the enforcement proceeding as moot on the authority of its earlier decision in *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (C.A. 9), which involved a similar situation (A. 48–49).

SUMMARY OF ARGUMENT

The holding of a valid representation election does not moot a Board order requiring an employer to remedy unfair labor practices committed during a prior election campaign. "[I]f the Board's order is justified, it is entitled to have it enforced as a means of insuring that in future elections the conduct may not be repeated." *National Labor Relations Board* v. *Marsh Supermarkets,* 327 F. 2d 109, 111 (C.A. 7), certiorari denied, 377 U.S. 944.

The contrary holding of the court below is apparently based on the assumption that a remedial order is unnecessary because the employer has ceased his unlawful conduct and because a recurrence of the organizational activity which stimulated the earlier unfair labor practices is unlikely. But it is well settled that an "employer's compliance with an order of the Board does not render the cause moot." *National Labor Relations Board* v. *Mexia Textile Mills,* 339 U.S. 563, 567. And, on the record here, there is no valid basis for concluding that no future organizational activity will occur at the Company's plant.

The effect of the court's order is to make it much less likely that employees will be assured that their activities will be free from Company coercion, and more difficult for the Board to deal with such coercion should it recur, by freeing the employer of any need ever to dispel the effects of his initial coercion. The order seems to view the Act as designed merely to protect a particular election or organizational process; but the public interest is not satisfied by the

fact that a valid election was held. There must also be assurance that Company's employees can engage in future organizational activities free from their employer's coercion.

ARGUMENT

THE BOARD'S ORDER REQUIRING THE COMPANY TO CEASE AND DESIST FROM THE UNFAIR LABOR PRACTICES FOUND WAS NOT MADE MOOT BY THE SUBSEQUENT HOLDING OF A VALID ELECTION

1. In *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563, 567, this Court held that an "employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court." For "[a] Board order imposes a continuing obligation, and the Board is entitled to have the resumption of the unfair labor practice barred by an enforcement decree" (*ibid.*). "The Act does not require the Board to play hide-and-seek with those guilty of unfair labor practices" (*id.*, at 568). Accord, *National Labor Relations Board* v. *Pool Mfg. Co.*, 339 U.S. 577; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 271.

Similarly, in other contexts, the Court has held that voluntary compliance will moot a case only where the alleged wrongdoer has overcome the "heavy burden" of demonstrating that "there is no reasonable expectation that the wrong will be repeated." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633. For,

unless the agency's order is enforced, the alleged wrongdoer is free to resume the challenged conduct at will. *Walling* v. *Helmerich & Payne,* 323 U.S. 37, 43; *Gray* v. *Sanders,* 372 U.S. 368, 375–376. The agency is entitled to a decree so that it may have recourse to contempt proceedings, should the conduct recur. *Walling* v. *Reuter Co.,* 321 U.S. 671, 673–674. Moreover, even though the private interests affected by the conduct involved may be vindicated without recourse to a court decree, the case will not be moot where the decree nevertheless is necessary "in furtherance of the public interest." *Walling* v. *Reuter Co., supra,* at 674. See also *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290, 309. *Wirtz* v. *Local 153, Glass Blowers Ass'n,* 389 U.S. 463, 474–475; *United States* v. *Concentrated Phosphate Export Assn.,* 393 U.S. 199, 203.

Consistent with these principles, other courts of appeals faced with the identical situation presented here have uniformly rejected the claim that a subsequent election renders moot a proceeding for enforcement of a cease and desist order relating to employer misconduct at the time of an earlier election. As stated in *National Labor Relations Board* v. *Marsh Supermarkets,* 327 F. 2d 109, 111 (C.A. 7), certiorari denied, 377 U.S. 944, "if the Board's order is justified, it is entitled to have it enforced as a means of insuring that in future elections the conduct may not be repeated." Accord, *National Labor Relations Board* v. *Metalab-Labcroft,* 367 F. 2d 471, 472 (C.A. 4); *Na-*

tional Labor Relations Board v. *Clark Bros.*, 163 F. 2d 373, 375 (C.A. 2).

2. As shown above (pp. 2–4), the Board found that during the course of an election campaign the Company engaged in conduct which violated Section 8(a)(1) of the Act and also prevented the holding of a fair election. The Board ordered the Company to cease and desist from the unfair labor practices found and also set aside the election the Union had lost and directed a second election at such time as the Regional Director deemed appropriate. The Company declined to comply with the unfair labor practice order, necessitating judicial proceedings to enforce the order. Meanwhile, the Union proceeded to a second election,[3] which was again set aside because of new acts of employer misconduct. And, about 17 months later, the Union proceeded to a third election, which it again lost, but this time no objections were filed, and the Board certified the result as valid.

The court below apparently reasoned that, since a valid election had been held, a remedial order in the unfair labor practice proceeding was unnecessary because the Company must have ceased its unlawful conduct, and a recurrence of the organizational activity which stimulated the unfair labor practices was

[3] Normally the Board will not hold a representation election until any outstanding unfair labor practices have been remedied. However, the Board will schedule an election at an earlier time if the party affected by the unfair labor practices makes a request to proceed. That party, however, may not rely on these unfair labor practices as a basis for setting aside the second election. See *Wm. L. Hoge & Co., Inc.*, 103 NLRB 20, n. 4; *Inyo Lumber Co.*, 92 NLRB 1267, n. 2.

unlikely.[4] Under the legal principles set forth above (pp. 7–9), the first assumption does not justify a refusal to enforce a Board order. Moreover, the second assumption is untenable.

The Board's experience has been that multiple election campaigns not infrequently precede successful organizational activity. Indeed, in its brief in the court below, the Company stated that "Approximately nineteen petitions for election have been filed at Raytheon plants during the period 1960–1966 * * *" (Br. p. 4). The Company plant involved here is large—over 500 employees were eligible to vote in the election; it is operated on three shifts; and its employees commute to work from a wide geographic area. It is not surprising, therefore, that organization might require a long term effort. And, although the Union lost three elections, each time its proportion of the vote increased. There is thus no reason to conclude, on the record here, that organizational efforts by the Union or some other labor organization have

[4] As articulated in its earlier opinion in *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570, 571–572, the court below relied on certain language in *National Labor Relations Board* v. *Jones & Laughlin Steel Co.*, 331 U.S. 416. There this Court stated that, "Where the order obviously has become moot, the court can deny enforcement without further ado." *Id.*, at 428. However, the quoted language suggests only that a reviewing court may consider the issue of mootness in the first instance; it does not indicate the circumstances under which a case is to be considered moot. Moreover, since the issue in *Jones & Laughlin* (whether a Board order covering plant guards was rendered moot by the subsequent deputization of those guards by the city) was entirely different from that here, the case cannot fairly be read as suggesting that a Board order should not be enforced in the present situation.

ended at the Mountain View plant, or that the Company would not resume its coercive interrogation, threats, and inducements should another election drive commence.[5]

3. The Board's order is primarily directed to protecting the *employees'* Section 7 rights. Hence, apart from any new organizational campaign initiated by a labor organization, the employees are entitled to assurance that whatever future organizational efforts they may undertake will be free from Company coercion.[6] The position of the court of appeals frustrates this purpose.

Ordinarily, the prospect that prompt compliance with a Board remedial order might dissuade the Board

[5] Section 9(c)(3) of the Act prohibits the direction of an election within 12 months of a valid certification. That period expired November 12, 1969. We have been advised that the International Brotherhood of Electrical Workers, which appeared on the ballot in the first election (n. 2, *supra*), is currently engaged in an organizational effort at the Mountain View plant.

[6] There is no substance to the Company's contention (Br. in Opp., p. 6) that the court below could have refused to enforce the Board's order because "the alleged unfair labor practice violations were so indigenous to the particular election campaign and of such a marginal nature as to render determination of the merits of the Board's findings inappropriate." The conduct found to be unlawful consisted of coercive interrogation, threats of loss of existing benefits, and promises of new benefits if union activity were discontinued; these are the typical types of restraint and coercion engaged in by an employer desirous of throttling organizational activity, and they are far from marginal. Moreover, the Board's order (*supra*, p. 4) bars not only a repetition in future campaigns of these specific coercive acts, but also directs the Company to refrain from violating its employees' Section 7 rights "in any like or related manner."

from seeking enforcement in the court of appeals will encourage employers to post the required notices immediately upon the Board's decision. Assuming the Board to have chosen an effective remedy, this will clear the air in relatively short order for future elections. While the contempt remedy will not be available if new unfair labor practices are thereafter committed, the employees in any subsequent election will at least have the benefit of knowing that their rights are being protected, and that their employer has been made to retract his coercive acts impinging upon them. But the employer knows that the union is likely to seek a second election before enforcement proceedings in the court of appeals can be ended;[7] if that election will moot the Board's order, the employer would find much less to gain from immediate compliance. He may be able to enjoy both the lingering effects of his initial coercion and freedom from any subsequent need to post notices and otherwise comply with the Board's remedy.

Of course, an employer campaigning against a union may and need not immediately comply with the Board's order—and, as shown (*supra*, pp. 7–8), the Board is entitled to seek enforcement even if he does. But the consequence of the Ninth Circuit's decision is

[7] The Board's records show that during the period July 1, 1967, to June 30, 1968, the median time between the issuance of a Board unfair labor practice order and a decision by the court of appeals was 542 days. In the present case, the period was 28 months.

that the employees never obtain any relief, however belated, for the harm done to them on account of their organizational activity. Even though the Board in certain circumstances permits the holding of a second election before outstanding unfair labor practices are remedied (*supra*, n. 3), this does not obviate the need for a remedy. Unredressed unfair labor practices can cast a long shadow into the future. The pressure a union may feel to participate in a second election before the conclusion of enforcement proceedings, rather than risk attrition in employee interest and support over time, should not relieve the employer of the necessity ever to comply with the Board's remedy. He would then be free to counter renewed organizational efforts by again engaging in the same kinds of unfair labor practices, without the possibility of triggering a contempt sanction, and thereby start the same cycle over again. In short, the decision below would in effect reward the employer for his non-compliance with the Act and Board orders issued pursuant thereto. Cf. *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 610–611.

This Court recently had occasion to consider a similar problem. In *Wirtz* v. *Local 153, Glass Blowers Ass'n*, 389 U.S. 463, the Court reversed the Third Circuit's holding that an intervening union election mooted a suit by the Secretary of Labor challenging a prior union election on the ground that it did not comply with the standards prescribed by Title IV of the Labor-Management Reporting and Disclosure Act

of 1959, 29 U.S.C. 481. The Court held that, "Aborting the exclusive statutory remedy would immunize a proved violation from further attack and leave unvindicated the interests protected by Section 401." *Id.*, at 475. Rejecting the argument of the Third Circuit that "no practical purpose" would be served by voiding the tainted election, the Court stated: "First, [the argument] fails to consider the incumbents' possible influence on the new election. Second, it seems to view the Act as designed merely to protect the right of a union member to run for a particular office in a particular election. But the Act is not so limited, for Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." (*Ibid.*)

These considerations are equally applicable here. For here, absent an enforced Board order, the Company is free to interfere with future elections. And here, as there, the public interest is not satisfied by the fact that a valid election was held. The public interest requires assurance that the Company's employees can engage in future organizational activities free from coercive practices by their employer.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals dismissing the Board's enforcement petition should be reversed and the case should be

remanded to that court for consideration of the unfair labor practice case on the merits.

Respectfully submitted.

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DECEMBER 1969.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

Sec. 9(c) * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. * * *

* * * * *

Sec. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that

any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply

to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record.

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Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 440.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
RAYTHEON COMPANY ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RAYTHEON COMPANY.

Question Presented.

Whether, on the basis of the record in this case, the Court of Appeals acted within its authority in dismissing a petition for enforcement of a National Labor Relations Board order.

Statement.

Raytheon Company, a Delaware corporation, is an electronics manufacturer with facilities in several states. As of the date of the hearing in this proceeding before a trial

examiner of the National Labor Relations Board (referred to herein as the "Board"), Raytheon employees in Massachusetts, Rhode Island, Connecticut, Oxnard and South San Francisco, California, were represented by unions. All of the bargaining units at these facilities had been organized peacefully and had never had a strike (Tr. p. 236). Approximately nineteen petitions for Board elections at Raytheon plants had been filed during the period 1960-1966 and except for the instant case, no objections had been filed with respect to Raytheon's preelection conduct (Tr. pp. 237-238).

The instant proceeding is based upon events arising at Raytheon's plant located in Mountain View, California, which is engaged in the design, development and manufacture of semiconductor products and solid state devices (A. 9). Upon a petition filed by the International Union of Electrical, Radio and Machine Workers, AFL-CIO (referred to herein as the "IUE"), the Board conducted a representation election at Raytheon's Mountain View plant on February 4, 1965. A majority of the employees in the bargaining unit rejected union representation.[1] Subsequently the IUE filed a petition to set aside the election and unfair labor charges (A. 10). The objections and the unfair labor practice charges were consolidated for hearing before a Board trial examiner (A. 8-9). The trial examiner issued a decision recommending that the Board set aside the election and issue an order finding that Raytheon had committed certain unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (referred to herein as the "Act") (A. 20-24). The decision stated that Raytheon's violation of Section 8(a)(1) was "in major part" through speeches made to employees in eight separate groups two days before the election by Ray-

[1] The tally of ballots was: 301 for no union; 161 for IUE; 54 for IBEW, an intervenor (A. 10).

theon's Vice President—Industrial Relations, Robert Hennemuth, and also through statements allegedly made in two conversations within "the week or so" preceding the election between first line supervisor Nicola Krest and employee Carol Alvarado [2] (A. 15-17). The recommendation that the election be set aside was based on these two unfair labor practice findings and an additional ground which the Board found unnecessary to resolve (A. 19). In affirming its trial examiner's decision, the Board found that the Hennemuth speeches and Krest-Alvarado conversations violated Section 8(a)(1) and set the election aside solely on those grounds (A. 3-4).

In a second election conducted by the Board on June 23, 1967, the employees again rejected union representation [3] (A. 30-31). The IUE filed a petition to set aside that election but did not file unfair labor practice charges (A. 31). On September 27, 1968, the Board issued an order setting aside the second election and directing a third election (A. 31). There is nothing in the record before this Court with respect to the specific grounds upon which the second election was set aside.[4]

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[2] The trial examiner's conclusion that the principal violation was through the Hennemuth speeches is also indicated by his statement that Krest's remarks to Alvarado took on "added emphasis and significance" from the Hennemuth speeches (A. 11).

[3] The final tally of ballots was: 418 for no union; 312 for IUE (A. 30-31).

[4] On pages 5 and 9 of its brief the Board refers to the grounds on which the second election was set aside as "further acts of interference" and "new acts of misconduct." In view of the absence of evidence relating to the specific conduct involved, the fact that Raytheon had no right of appeal and the absence of unfair labor practice charges relating to Raytheon's conduct prior to the second election, no adverse inferences should be drawn from the setting aside of the second election.

A third election was conducted on November 1, 1968, and the employees again rejected representation by the IUE [5] (A. 32-33). On November 12, 1968, the Board's regional director certified the results of the election thus terminating the representation proceeding (A. 34).

On February 8, 1968, the Board, pursuant to Section 10(e) of the Act, petitioned the United States Court of Appeals, Ninth Circuit, for enforcement of its unfair labor practice order (A. 25-26). Subsequent thereto the IUE filed a petition in the same Court to review that portion of the Board's order dismissing the IUE's motion to amend the complaint to include further unfair labor practice allegations (A. 4, fn. 2). These two petitions were consolidated. Briefs were filed and on January 7, 1969, oral argument was held.[6]

In its brief Raytheon set forth in detail its position that it had not violated Section 8(a)(1) either through the Hennemuth speeches or the Krest-Alvarado conversations. With respect to the allegations relating to the Hennemuth speeches, Raytheon relied on authorities holding that similar statements were protected by the free speech provision in Section 8(c) of the Act (Raytheon Brief, 9th Cir. pp. 13-25). Specifically, Raytheon set forth references to other portions of the speech to show that those portions cited by

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[5] Final tally of ballots was 258 for no union; 204 for IUE (A. 32-33).

[6] Although Raytheon's motion to intervene in the proceeding initiated by the IUE's petition was granted by the Court, no such motion was made by the IUE with respect to the proceeding initiated by the Board's petition for enforcement. The IUE's counsel, however, did participate in the argument on the merits with respect to the petition for enforcement.

the trial examiner were taken out of context[7] (Raytheon Brief, 9th Cir. pp. 6-11). With respect to the reference to sick leave, referred to on page 3 of the Board's brief before this Court, it was pointed out that other portions of the speech and the fact that the sick leave issue was raised initially by the employees demonstrated that the quoted statements did not constitute a threat against union representation but merely pointed out certain economic circumstances in the same manner in which they might have been made at the bargaining table (Raytheon Brief, 9th Cir. pp. 10, 24). The brief also recited the specific circumstances under which the "improved grievance procedure" issue arose and demonstrated that such characterization was an elaborate expansion of remarks made by Hennemuth in response to questions from employees to the effect that it

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[7] For example, at the outset of the speech to the first group, Hennemuth stated:

> "And we recognize that this election, which is going to be held Thursday, is strictly your business but we do feel obligated as the management of the company to make sure that you have the facts that are involved as we see them and then you make your own choice and vote whichever way you please and I promise you on behalf of the company, first of all we won't know how you vote, but even if we did there will be absolutely no recrimination of any kind. This is a free election in the good old American tradition and we heartily approve of the whole idea. It is the best way I know of to settle any kind of a matter that is a public issue, if you will." (Resp. Ex. 3, p. 1, lines 21-30).

Similar statements were made elsewhere in the speeches. See Resp. Ex. 3, p. 4, lines 5-7; Resp. Ex. 4, p. 3, lines 10-11; Resp. Ex. 5, p. 5, lines 29-31, p. 12, lines 28-29, p. 13, lines 12-19; Resp. Ex. 6, p. 2, lines 3-15, p. 9, lines 2-9, 26-32, p. 10, lines 1-4; Resp. Ex. 7, p. 1, lines 20-26, p. 2, lines 17-23, p. 3, lines 4-18, p. 13, lines 7-15; Resp. Ex. 8, p. 2, lines 31-32, p. 3, lines 1-3, 17-27, p. 11, lines 1-8, p. 16, lines 1-3; Resp. Ex. 9, p. 1, lines 5-10, p. 3, lines 1-13, p. 9, lines 9-22.

was one of the functions of his office to cure inequities "that involved human beings anywhere in the Company" (Raytheon Brief, 9th Cir. pp. 10-11, 24-25).

With respect to the Krest-Alvarado conversations, Raytheon argued in its brief that no proper credibility findings were made to resolve the conflict in testimony between Krest and Alvarado; that in any event Krest's alleged statements were lawful and protected by Section 8(c); and that the incident did not reflect a general plan of coercion by Raytheon and must be considered de minimis (Raytheon Brief, 9th Cir. pp. 3, 25-31).

Following arguments by counsel for the IUE and the Board relating to the merits of the petition for enforcement, Raytheon's counsel at the outset of his argument on the merits referred the Court to its decision in *General Engineering, Inc.* v. *National Labor Relations Board,* 311 F. 2d 570 (9th Cir. 1962), and pointed out that the results of the third election had been certified by the Board. The Court gave counsel leave to supplement the record and move dismissal of the petitions (A. 48). Thereupon, Raytheon filed a motion to dismiss dated January 16, 1969, and submitted as part of said motion the tally of ballots and certification of results of the third election (A. 29-36).

Both the Board and the IUE subsequently submitted memoranda in opposition to the motion to dismiss (A. 37-47). On February 19, 1969, the Court issued its decision granting the motion to dismiss (A. 48-49). Judgment was entered on the same day dismissing both the Board's petition for enforcement and the IUE's petition for review (A. 49-50). In an order dated May 8, 1969, petitions for rehearing filed by the Board and the IUE were denied and a suggestion for rehearing en banc was rejected (A. 51).

Summary of Argument.

Section 10(e) of the Act vests in the Courts of Appeals considerable discretion in deciding whether to enforce Board orders.

This Court should not reverse a decision of a Court of Appeals dismissing a Board petition unless abuse of discretion can be shown. Dismissal of the petition in the instant case was a proper exercise of the Court of Appeals' discretion.

Although the Court used the term "moot," the opinion and judgment reflect that the dismissal was not based on mootness in its classical sense, but rather on the determination that, under the circumstances, enforcement of the order would have too minimal an impact on private or public interest to justify exercise of the judicial function. The significant facts upon which the Court's decision was based were that alleged unfair labor practices, the sole ground on which the election was set aside, were indigenous to the representation case and of a marginal nature. By fully considering the merits of certain alleged unfair labor practices in *General Engineering, Inc.* v. *National Labor Relations Board,* 311 F. 2d 570 (9th Cir. 1962), the Ninth Circuit demonstrated that it would not dismiss summarily, upon the holding of a subsequent certified election, unfair labor practice violations not indigenous to the representation case.

The merits of the alleged unfair labor practice presented issues related to statutory and constitutional protections of free speech and the possibility that similar violations would occur in the future was too minimal to require the Court to give full consideration to the merits. The decision was appropriate for court rather than agency determination. If the Courts of Appeals do not have sufficient discretion to take action, such as that in the instant case, dockets could be inundated with trivial matters.

The three Courts of Appeals decisions cited by the Board as being contrary to that of the Court below involved the exercise of discretion under essentially different facts and circumstances. In two cases the unfair labor practices respondent sought to have dismissed on the basis of a subsequent certified election were not indigenous to the representation case and in the third the allegedly unlawful speech was given to other employees in addition to those participating in the subsequent certified election.

In *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938), the unfair labor practice which respondent contended was mooted by a subsequent certified election was a violation of Section 8(a)(2) which was not indigenous to the representation case.

The decision of the Court of Appeals does not conflict with the cases cited by the Board for the principle that voluntary compliance with a Board order is not a defense to a petition for enforcement. Subsequent to *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (9th Cir. 1962), the Ninth Circuit has reaffirmed its acceptance of this principle.

There is no showing on this record that the organizational rights of employees are frustrated by the decision of the Court of Appeals. The Court could conclude from the record that the public interest would best be served by dismissing the petition.

Argument.

The Dismissal by the Court of Appeals of the Board's Petition for Enforcement of its Order was a Proper Exercise of the Discretion Vested in that Court by Section 10(e) of the Act.

a) The Court of Appeals Had the Discretion under Section 10(e) of the Act to Dismiss the Board's Petition on the Basis of the Facts in the Supplemented Record before It.

The underlying issue before this Court is the extent to which Courts of Appeals have the authority to exercise the discretion granted them by the Act.

The role in reviewing unfair labor practice orders assigned to the Courts of Appeals by Congress is set forth in Section 10(e) of the Act which provides in relevant part that:

> ". . . the court . . . shall have power to . . . make and enter a decree enforcing, modifying . . . or setting aside in whole or in part the order of the Board. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari . . ." 49 Stat. 454, 61 Stat. 148, 29 U.S.C. § 160(e).

Unlike the Labor-Management Reporting and Disclosure Act of 1959, Section 402(c) [8] which requires the Court to declare an election void upon appropriate establishment by the Secretary in court that there may have been a violation, Congress specifically made the enforcement language in the National Labor Relations Act permissive. Cf. *Wirtz v. Local 153, Glass Bottle Blowers Association of the United States and Canada, AFL-CIO*, 389 U.S. 463, 474 (1968). The words "the court shall make and enter a decree" were ex-

[8] 73 Stat. 534; 29 U.S.C. § 482 (c).

pressly considered and rejected by Congress [9] in favor of the words "the court shall have power to make and enter a decree." The language used clearly reflects an intent to confer upon the Courts of Appeals not only the power to enforce, modify or set aside but also the power summarily to dismiss a petition for enforcement.

The fact that Board orders are not self-enforcing further reflects a congressional intent to give the Courts of Appeals considerable responsibility with respect to the enforcement of the orders. This Court has on several occasions noted the extent of this responsibility. In *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474, 490-491 (1951), the Court described the responsibility of the Courts of Appeals in enforcing Board orders as follows:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that

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[9] S. 1958, 74th Cong. 1st Sess. as reported, 4th Senate Print shows the adoption of House Amendment 16 as follows:

> ". . . the court . . . shall have power . . . and (16) ~~shall~~ *to* make and enter a decree enforcing, modifying . . . or setting aside in whole or in part the order of the Board . . ." Legislative History of the National Labor Relations Act of 1935, compiled by the National Labor Relations Board, U.S. Govt. Printing Office, 1949, p. 3246.

S. 1958 with these changes adopted was enacted as the National Labor Relations Act of 1935 on July 5, 1935, *Ibid*, pp. 3270, 3276.

House Report No. 1371 on S. 1958, 74th Cong., 1st Sess. describes the effect of House Amendment 16 as follows:

> "House amendment no. 16 was accepted in the conference agreement as conforming to the language of the Federal Trade Commission Act, *in using the language of authorization rather than mandatory language* in empowering the court to enter the appropriate decree." (Emphasis added.) Legislative History of the National Labor Relations Act of 1935, compiled by the National Labor Relations Board, U.S. Govt. Printing Office, 1949, p. 3257.

courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

. . . . . .

"Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

b) In Dismissing the Board's Petition for Enforcement the Court of Appeals Properly Exercised its Discretion.

On certiorari this Court should not reverse the decision of the Court of Appeals unless that Court has abused its

discretion even if under the circumstances this Court concludes that the merits of the alleged unfair labor practice should have been fully reviewed. In *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502-503 (1951), this Court expressed the applicable standard of review, as follows:

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders.
>
> . . . . . .
>
> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' *Federal Trade Comm'n* v. *American Tobacco Co.*, 274 U.S. 543, 544 [47 S. Ct. 663, 71 L. Ed. 1193]."

The issue before the Court is not one on which deference to the Board's special competence is appropriate, but is rather an exercise of the judicial function of determining

whether circumstances arising after issuance of an order render its enforcement inappropriate. The limits of the Board's expertise were described in *National Labor Relations Board* v. *Brown Food Store,* 380 U.S. 278, 290-292 (1965), as follows:

> "It is argued, finally, that the Board's decision is within the area of its expert judgment and that, in setting it aside, the Court of Appeals exceeded the authorized scope of judicial review. This proposition rests upon our statement in *Buffalo Linen* that in reconciling the conflicting interests of labor and management the Board's determination is to be subjected to 'limited judicial review.' 353 U.S., at 96 [77 S. Ct. 643]. When we used the phrase 'limited judicial review' we did not mean that the balance struck by the Board is immune from judicial examination and reversal in proper cases. Courts are expressly empowered to enforce, modify or set aside, in whole or in part, the Board's orders, except that the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. National Labor Relations Act, as amended, §§ 10(e), (f), 29 U. S. C. §§ 160(e), (f) (1958 ed.). Courts should be 'slow to overturn an administrative decision,' *Labor Board* v. *Babcock & Wilcox Co.,* 351 U. S. 105, 112 [76 S. Ct. 679, 100 L. Ed. 975], but they are not left 'to "sheer acceptance" of the Board's conclusions,' *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793, 803 [65 S. Ct. 982, 89 L.Ed. 1372]. Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such

> review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' *American Ship Building Co.* v. *Labor Board, post* at 318 [85 S. Ct., at 967]." (Footnote omitted.)

The instant case comes before this Court without an opinion by the Court of Appeals on the merits of the Board's petition for enforcement of its unfair labor practice order. The Court of Appeals granted Raytheon's motion to dismiss the Board's petition on the authority of its prior decision in *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (9th Cir. 1962). Since this motion was not made until after the case had been briefed and orally argued on the merits, the Court of Appeals did have the opportunity to review the entire record in the case. The judgment specifically states that the "Cause came on to be heard *on the Transcript of the Record from the National Labor Relations Board* and on motion of respondent for dismissal of petition to enforce and was duly submitted" (A. 49). (Emphasis supplied.)

Although *General Engineering Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (9th Cir. 1962) did describe unfair labor practices related to a representation case as

being rendered "moot" by a certification in the representation case, neither that case nor the instant case should be regarded as having been decided on the basis of "mootness" as that term is used in its classical sense. Generally a case is not moot if issues remain in controversy for decision by the court. The Ninth Circuit's decision in both cases should be construed as a determination, in the exercise of the discretion vested in the Court by Section 10(e) of the Act, that on the basis of all of the circumstances, including the subsequent certification, enforcement was inappropriate. In *General Engineering* the Ninth Circuit relied on a passage from *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 331 U.S. 416, 428 (1947), that clearly indicates that the Court of Appeals does have discretion to evaluate the impact of changing circumstances upon a Board order.[10] In the instant case both the fact that the Court did have the opportunity to evaluate the merits and its reference in the judgment to the fact that the case had been submitted upon the transcript indicate that the determination was made upon the entire record and not upon an abstract concept relating to mootness.

In *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570, 572 (9th Cir. 1962) the Court did not rule that the Board's petition to enforce an unfair labor practice order was rendered moot in its entirety by

[10] "When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration. For example, where the order obviously has become moot, the court can deny enforcement without further ado; but where the matter is one involving complicated or disputed facts or questions of statutory policy, a remand to the Board is ordinarily in order." *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 331 U.S. 416, at 428.

a subsequent certification but only "*all portions of the order under review which relate to the representation case.*" (Emphasis supplied.) In that case the unfair labor practice found to be moot consisted of statements in preelection speeches and literature. The Court proceeded to adjudicate on the merits issues in the same case relating to an alleged violation of Section 8(a) (1) involving discharge of a supervisor and alleged violations of Section 8(a) (3) involving discharge of two employees. By adjudicating those unfair labor practices on the merits the Court clearly indicated that only Section 8(a) (1) violations "related" to the representation case would be rendered moot by a subsequent certification.

Violations of Sections 8(a) (2) (unlawful domination of a labor union); 8(a) (3) (unlawful discrimination to encourage or discourage membership in a labor union); 8(a) (4) (unlawful discrimination against an employee because of filing of a charge or giving testimony under the Act); and 8(a) (5) (unlawful refusal to bargain) are independent of any representation case and should not be rendered moot by a subsequent certification. Even violations of Section 8(a) (1) with a potential impact beyond the representation case could be regarded as appropriate for full determination on the merits. For example, maintenance of an allegedly unlawful no-solicitation clause, such as that involved in *National Labor Relations Board* v. *Clark Bros. Co., Inc.*, 163 F. 2d 373 (2d Cir. 1947), might well be considered not to have been rendered moot by a subsequent certification since such a violation has a continuing impact which could extend beyond a certification. Particularly flagrant violations of Section 8(a) (1) might also have a potential impact extending beyond a subsequent certification and thus require full consideration on the merits and enforcement of the Board order.

The record in the instant case demonstrates that the alleged unfair labor practices were solely related to and inseparable from the election proceeding. The Hennemuth speeches were made two days prior to the election for the express purpose of presenting to the employees Raytheon's position with respect to the forthcoming election (A. 10-17). The Krest-Alvarado conversations between a first line supervisor and a single employee in a unit of more than 500 occurred a week or so prior to the election; were initiated by campaign-related events; and involved alleged remarks directly related to the campaign (A. 10, 11). These alleged unfair labor practices were the sole ground on which the election was set aside. Moreover, despite the conclusionary characterizations of Raytheon's conduct by the Board, the alleged unfair labor practices could have been regarded by the Court of Appeals on the basis of the briefs and argument, and, certainly on the basis of the transcript, as being marginal in nature.

Where, as here, the alleged unfair labor practices are related to the representation case, the Court of Appeals, in the exercise of its discretion under Section 10(e) of the Act, could conclude that the unfair labor practice case retained insufficient practical significance to justify full consideration on the merits. Despite the Board's efforts to characterize in broad terms the conduct in question, the Hennemuth speeches and the Krest-Alvarado conversations were relevant only to the particular representation proceeding which commenced with the filing of the petition by the IUE on January 4, 1965, and terminated with the certification of November 12, 1968. If issued, the only genuine value of the order would have been to advise the employees, before they exercised their right to vote in the particular proceeding, that the conduct in question constituted an unfair labor practice. When the representation proceeding terminated, the practical necessity for the

Board's order dissolved. An election had been held under proper circumstances without the order.

The significance of this case is its insignificance. The real issue in the case relates to the extent to which the Courts of Appeals can exercise control over the types of cases which must be adjudicated on the merits. Stated in other words, does the Act require that the Courts of Appeals must consider fully the merits of every Board petition for enforcement of an unfair labor practice order, regardless of how insignificant an impact enforcement would have on public or private interests?

If this question is answered in the affirmative and the Board's position as set forth in its brief is accepted, neither compliance nor changing circumstances would justify refusal of a Court of Appeals to grant full consideration on the merits of a Board petition for enforcement of an unfair labor practice order no matter how trivial the offense charged. The logical extension of the Board's position is that it would be entitled to such consideration of a petition for enforcement even where the employer complied in full with an order relating to preelection conduct and in a subsequent election the union was selected as bargaining representative. Whether or not enforcement would be sought in such a case, the Board's position is that it, and not the Court of Appeals, would be the arbiter in deciding whether the petition may be dismissed by the Court of Appeals.

To concede to the Board that it is entitled to full consideration on the merits of unfair labor practices even when changing circumstances render impact of the order insignificant, such as in this hypothetical case, would indeed frustrate congressional intent. If Congress had intended for the Board to have complete control over the enforcement of its orders, the Act would have provided for self-enforcement. Assuming, contrary to the Board's position,

that its petition for enforcement would be properly dismissed if the employer had complied with the order and the Union won the election, the question as to whether the circumstances of the case at bar rendered the proceeding appropriate for summary dismissal is essentially one of degree, which is within the discretion of the reviewing court. *Hecht Company* v. *Bowles,* 321 U.S. 321 (1944).[11]

The Board's argument that the position of the Court of Appeals frustrates the protection of future organizational rights ignores the evident fact that, if the order is to have any practical effect in protecting organizational rights, it must be enforced during the representation proceeding in which it arose. If the Board is concerned that a new election will be held under unsatisfactory conditions, the Board —not the employer—can defer the election and expedite its enforcement effort. Indeed its own decision orders the regional director to conduct a new election "at such time as he deems that circumstances permit the free choice of a bargaining representative" (A. 6). Having certified the election results and terminated the representation case, the Board by continuing to seek enforcement of its order is requesting the Court of Appeals to divert its energies from the vital issues involved in other litigation in order to resolve what is, for all practical purposes, an academic question. Whether or not the fact that the Board is seeking a permanent order has technically kept the unfair labor practice proceeding alive, the Court of Appeals has jurisdiction to determine that the minimal impact of an order of this nature does not justify full consideration of the case on its merits.

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[11] As was said at page 329: "A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."

The central issue with respect to the merits of the Board's unfair labor practice findings, as briefed and argued before the Court of Appeals, was whether statements in the Hennemuth preelection speeches and the Krest-Alvarado interviews were protected by the guarantees of free speech in Section 8(c) of the Act and the First Amendment. Full consideration of the merits of this case would require resolution of issues related to statutory and constitutional protection of free speech. This Court has consistently stated that Federal Courts do not have jurisdiction to resolve academic questions, particularly those involving constitutional issues. *Hall* v. *Beals*, 90 S. Ct. 200 (1969); *Golden* v. *Zwickler*, 394 U.S. 103 (1969). Even if, as the Board contends, it is seeking an order to enjoin such conduct in the future, the case can be moot, if the issues remaining are too minimal to justify exercise of judicial power. In *Golden* v. *Zwickler*, 394 U.S. 103 (1969), plaintiff was seeking a declaratory judgment against the district attorney, holding that a law prohibiting distribution of anonymous literature in connection with an election campaign was an unconstitutional limitation on the right of free speech. The complaint had alleged that the plaintiff intended to continue to distribute such literature in connection with election campaigns of a particular congressman. This Court held that the fact that the congressman in question resigned from the House of Representatives to accept a position as a state judge with a tenure of fourteen years rendered moot plaintiff's action for declaratory judgment. Yet, in *Golden* v. *Zwickler*, even though the congressman had resigned there was the possibility that if the congressman did not personally run for office in plaintiff's district, his successor or others would and plaintiff would again wish to distribute anonymous literature. The need for declaratory judgment in *Golden* v. *Zwickler* appears to be no more remote than the Board's need for enforcement of its order in this case.

A respected commentator in the field of administrative law has cautioned against the abdication by courts to administrative agencies of the traditional judicial function.[12] Agencies, such as the Board, staffed by individuals concentrating their time and effort upon problems arising in a particular field of specialization, are not in the same position as the courts to balance competing interests.[13]

As the commentator stated:

> "An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions, of the 'common law,' and the ultimate guarantees associated with the Constitution. Thus in the review of administrative actions a court may appeal to criteria of validity which have no specific locus in the statute." [14]

In reviewing the petition for enforcement in the instant case the Court could consider whether the subsequent certification would render an already trivial case so insignifi-

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[12] Jaffe, Judicial Control of Administrative Action (1965), pages 575-592.

[13] See *Southern Steamship Co.* v. *National Labor Relations Board,* 316 U.S. 31 (1942) where a Board order requiring an employer to reinstate seamen who had engaged in what the Board concluded was a strike to protect unfair labor practices was reversed by this Court on the ground that the strike violated the Mutiny Act.

[14] Jaffe, Judicial Control of Administrative Action (1965), page 590.

cant as to justify dismissal of the petition without full consideration on the merits of alleged unfair labor practices. There is a compelling reason why Courts of Appeals should have the right to determine that in some cases enforcement should be denied even without full consideration of the merits. In the interests of sound judicial administration the Courts of Appeals must have some basis for avoiding full consideration on the merits of insignificant, trivial cases with minimal impact on public or private interests. In recent years increasing attention has been given to the crowded state of the dockets before the Courts of Appeals. Noted jurists have called the attention of members of the bar to this problem.[15] The Board's construction of Section 10(e) in such a manner as to deprive the Courts of Appeals of the authority to exercise their discretion to dismiss summarily trivial cases which should not be consuming the time of the Courts, will make no contribution toward easing the problem.

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[15] "In the Courts of Appeals there has been a major increase in filings with the resultant increase in the number of pending cases. In only two years the number of pending appeals increased from 2,900 to 3,900, a rise of more than 1/3 in the number." Address of Hon. Earl Warren, Chief Justice of the United States, to the annual meeting of the American Law Institute, May 20, 1964. 35 F.R.D. 181, 184 (1964).

"What you don't realize is, perhaps that in the last six years of volume of appeals in the United States Court of Appeals across the country has risen well over 100 percent and the backlog has increased 300 percent." Address of Hon. John R. Brown, Chief Judge, United States Court of Appeals, Fifth Circuit to the Section of Labor Relations Law, American Bar Association, August 6, 1968. Report of the Section of Labor Relations Law, Section III, "The Rat Race, The Human Race and The Court House Race," p. 183 (1969).

See also Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542 (1969).

c) The Authorities Cited by the Board do Not Require Reversal of the Decision of the Court of Appeals Dismissing the Board Petition for Enforcement of its Order.

The three decisions of other Courts of Appeals holding that a subsequent election did not render moot a proceeding for enforcement of a cease and desist order relating to employer misconduct are not in conflict with the decision of the Court of Appeals in the instant case.[16]

In *National Labor Relations Board* v. *Metalab-Labcraft*, 367 F. 2d 471 (4th Cir. 1966), only one election was held which was duly certified by the Board. The unfair labor practices which the employer was seeking to have deemed moot as a result of a subsequent certification were not connected to the election campaign. Not only did some of the unfair labor practices involve violations of Section 8(a) (3) but even the 8(a) (1) violations were not found to be a basis for setting aside the election. Moreover, all of the unfair labor practices were too remote in time from the election to be regarded as having any connection with the representation case. The alleged violations of Sections 8(a)(1) and 8(a) (3) occurred during the period September 20-October 3, 1963, whereas the election was not held until January 24, 1964.

Although in *National Labor Relations Board* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109 (7th Cir. 1963), cert. denied 377 U.S. 944 (1964), the Section 8(a)(1) violation which the employer was contending was moot involved a

[16] In *General Electric Co.* v. *National Labor Relations Board*, 400 F. 2d 713, 717, footnote 2 (5th Cir. 1968), cert. den. 394 U.S. 904 (1969), the Court noted that the decision in *General Engineering* applied to preelection violations concerning "mainly the election." In *General Electric* the unfair labor practices were not deemed to have been rendered moot by a subsequent certification since the company's coercive activity occurred prior, during and after the October, 1963, election which was won by the union.

preelection speech, the Board's order was also based upon the fact that the same speech had been given to other employees who were not affected by the subsequent certified election. See *Marsh Supermarkets, Inc.*, 140 N.L.R.B. 899 (1963). Consequently, the Court in any event had to adjudicate the merits of the validity of the speech so that the violation the employer sought to have declared moot was cumulative and would not have affected the scope of the unfair labor practice order.

Finally, as noted above, one of the 8(a)(1) violations which the employer was contending had been rendered moot by a subsequent certified election in *National Labor Relations Board* v. *Clark Bros. Co., Inc.*, 163 F. 2d 373 (2d Cir. 1947) was the maintenance of an unlawful no-solicitation clause. Such a violation clearly has an independent effect apart from the representation case. One of the other two alleged violations in *Clark Bros.*, a finding of unlawful surveillance, might also be deemed to have an independent effect beyond the representation case.

National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938), involved a question of mootness raised before the Supreme Court rather than the Court of Appeals. In that case the fact that some, but not all, of the employees affected by the unfair labor practice had selected a bona fide union as their bargaining representative pursuant to Board certification, did not render moot an order directing the employer to dissolve a dominated labor organization. Under the facts of that case, such a decision is not inconsistent with the decision by the Court of Appeals in this case. As noted above, Section 8(a)(2) violations are not "related" to a representation case as the term was used in *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (9th Cir. 1962).

Contrary to the position taken by the Court in *National Labor Relations Board* v. *Metalab-Labcraft*, 367 F. 2d 471 (4th Cir. 1966) and *National Labor Relations Board* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109 (7th Cir. 1963), the decision of the Ninth Circuit in this case and *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (9th Cir. 1962) does not conflict with the general doctrine that compliance with a Board order does not render the order moot. *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563 (1950); *National Labor Relations Board* v. *Pool Manufacturing Co.*, 339 U.S. 577 (1950). In *Mexia*, this Court enunciated the principle that compliance with a Board order is no defense to the Board's petition for enforcement. This principle has been applied by the Ninth Circuit in such cases as *National Labor Relations Board* v. *Rippee*, 339 F. 2d 315 (9th Cir. 1964) and *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. 2d 193 (9th Cir. 1938). The *Rippee* decision is particularly significant since two of the three judges participating in that per curiam decision which applied the *Mexia* principle to a violation of Section 8(a)(5) had participated in the earlier decision in *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (9th Cir. 1962) and the third judge participated in the per curiam decision in this case.

The Board also cites several other cases arising outside the Act for the proposition that voluntary compliance with an administrative order is not a defense in an enforcement proceeding. *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37 (1944); *Gray* v. *Sanders*, 372 U.S. 368 (1963); *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897); *United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199 (1968); *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671 (1944). These cases are basically

inapplicable on their facts to the instant case.[17] None of them involved the National Labor Relations Act. None of them should constitute controlling precedent with respect to the instant case involving a unique set of circumstances arising in the context of representation and unfair labor practice proceedings under the Act.

Wirtz v. *Local 153 Glass Bottle Blowers Association*, 389 U.S. 463 (1968), cited on pages 8, 13 and 14 of the Board's brief, arose under Title IV of the Labor-Management Reporting and Disclosure Act which conferred on the Secretary of Labor authority to supervise elections of union officers. In holding that the Court of Appeals, Third Circuit, erroneously refused to enforce a District Court order requiring a new election under the supervision of the Secretary of Labor, this Court relied on express statutory language [18] supported by legislative history. In the instant case, Congress did not specifically provide in the Act that a Court of Appeals shall enforce a Board order on the basis of the Board's findings but that it "shall have power" to do so. It is apparent from the language of Section 10(e) that the question of whether to enforce a given order was reserved for decision by the Court of Appeals.

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[17] *Trans-Missouri* and *Concentrated Phosphate Export Association* were anti-trust cases in which the dissolved associations were not the only defendants against whom the Government sought injunctive relief. *Gray* v. *Sanders* involved the unconstitutionality of a state statute which continued in force despite the temporary abandonment of the specific practice enjoined. *Helmerich & Payne* and *James V. Reuter, Inc.* each involved violations of the Fair Labor Standards Act, in which the facts indicated a strong likelihood that the violations would resume, absent an injunction.

[18] Sec. 402 (c) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 534, 29 U.S.C. § 482 (c), provides that upon a finding that the Act has not been complied with, "the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary . . ."

d). The Court of Appeals Dismissal of the Board's Petition under the Particular Circumstances of this Case does Not Frustrate the Purpose of Section 7 of the Act.

As discussed above, the Court of Appeals had before it a record indicating that the alleged unfair labor practices were indigenous to the representation case and of a marginal nature. In addition, the Court had before it evidence that Raytheon was not a hard core anti-union employer. On page 10 of its brief the Board quoted from Raytheon's brief before the Ninth Circuit to the effect that between 1960 and 1966 Raytheon had been involved in 19 organizational campaigns. The Board omitted the balance of the paragraph in the brief which demonstrated Raytheon's fair and equitable conduct in its relationships with employees and their unions.[19] The Court of Appeals could properly consider such a background in determining whether adjudication of the unfair labor practice issues on the merits was warranted.

The argument that the decision of the Court below frustrates the purpose of Section 7 of the Act ignores realities of the actual situation in this case. The Court of Appeals could properly conclude that the setting aside of the earlier election and the holding of the new election under the particular circumstances present in this case sufficiently protected the right of the employees to continue future organizational efforts to the fullest extent. The Board is attempting to ignore the factual situation and by arguing

[19] "As of the date of the hearing Raytheon employees in Massachusetts, Connecticut, Rhode Island, and Oxnard and South San Francisco, California, were represented by unions and there had never been a strike by Raytheon employees (Tr. p. 236). Approximately nineteen petitions for elections have been filed at Raytheon plants during the period 1960-1966 and, prior to the instant case, no objections had been filed to Raytheon's preelection conduct (Tr. pp. 237-238)." (Raytheon Brief, 9th Cir. p. 4.)

in broad general terms, to create the impression that the decision of the Court below was in complete disregard of employee rights. The Court below, however, should not be regarded as establishing broad general rules to apply in a wide variety of cases of varying degrees of unfair labor practices, but was limiting its decision to the particular factual situation.

It is submitted that the Board is seriously overdramatizing the impact of the alleged unfair labor practices involved here upon future organizational activity of the employees. Its statement "unredressed unfair labor practices can cast a long shadow into the future" although impressive rhetoric has little relevance to the fact situation presented in this case. "But such speculative contingencies afford no basis for our passing on the substantive issues the appellants would have us decide . . ." *Hall* v. *Beals*, 90 S. Ct. 200, 202 (1969).

Conclusion.

For the foregoing reasons, the judgment of the Court of Appeals dismissing the Board's enforcement petition should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 440.—October Term, 1969

National Labor Relations Board, Petitioner, v. Raytheon Company et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 18, 1970]

Opinion of the Court by Mr. Justice Marshall, announced by Mr. Justice Stewart.

This case was brought here on certiorari by the National Labor Relations Board for review of the dismissal of its petition for enforcement of a cease-and-desist order forbidding certain conduct of the Raytheon Company found to be in violation of § 8 (a)(1) of the National Labor Relations Act.

After it lost a representation election conducted by the Board on February 4, 1965, the International Union of Electrical, Radio and Machine Workers, AFL–CIO, filed objections to the election and unfair labor practice charges, both based on pre-election misconduct of the company. On October 19, 1965, an unfair labor practice complaint issued alleging violations of § 8 (a)(1). The proceedings on that charge were consolidated with the objections to the election case, and a hearing was held before a Trial Examiner. Thereafter, on October 5, 1966, the Board rendered its decision, ordering that a new election be held and that the company cease and desist certain antiunion activity.

On February 8, 1968, pursuant to § 10 (e) of the Act, the Board filed a petition in the Court of Appeals for the Ninth Circuit seeking enforcement of its unfair

labor practice orders. The company answered, urging that enforcement be denied on the merits and on the ground that the proceedings were moot because a second election had been held in the interim. After the case was briefed and argued on the merits, the company called to the attention of the court that yet a third election had been held and that this time the result (a majority vote for "no union") had been certified by the Board. The question whether this intervening election had mooted the case was briefed on all sides; and, on the authority of its earlier decision in *General Engineering, Inc.* v. *NLRB*, 311 F. 2d 570 (C. A. 9th Cir. 1962), the Court of Appeals dismissed the proceedings with a brief *per curiam*. 408 F. 2d 681 (C. A. 9th Cir. 1969). We granted certiorari, 396 U. S. 900 (1969), and we reverse.

As stated by the Court of Appeals, the ground upon which the petition was dismissed was "that since [it was] filed the Board has held a new representation election and certified the result." Thus, without more, the Court followed its decision in *General Engineering* that an intervening election "makes moot all portions of the order under review which relate to the representation case." 311 F. 2d, at 572. We cannot agree to the automatic effect accorded in *General Engineering* to a later valid election and rather find correct the decisions of the two circuits that have specifically refused to adopt the reasoning of that case. *NLRB* v. *Metalab-Laberaft*, 367 F. 2d 471 (C. A. 4th Cir. 1966); *NLRB* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109 (C. A. 7th Cir. 1963); cf. *NLRB* v. *Clark Bros.*, 163 F. 2d 373 (C. A. 2d Cir. 1947).

In *NLRB* v. *Mexia Textile Mills*, 339 U. S. 563, 567–568 (1950), this Court held:

> "We think it plain from the cases that the employer's compliance with an order of the Board does

> not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court. . . . A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree. . . . The Act does not require the Board to play hide-and-seek with those guilty of unfair labor practices."

Properly viewed, this holding controls the present case. The later election and certification here is simply evidence that the company complied with the Board order during the pendency of the election. The Act, however, is not designed merely to protect a particular election or organizational campaign. It is designed to protect employees in the exercise of their organizational rights, and that protection cannot be affected merely because a particular labor organization has chosen an immediate election rerun rather than awaiting enforcement of the Board order.

Undoubtedly, as the Court recognized in *NLRB* v. *Jones & Laughlin Steel Co.*, 331 U. S. 416, 428 (1947), there are situations where an enforcement proceeding will become moot because a party can establish that "there is no reasonable expectation that the wrong will be repeated." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953). But this is not such a case. Nothing in the record here shows that the specific acts complained of have not been repeated nor gives any assurance that they will not be repeated in the future. Cf. *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 203 (1968); *Wirtz* v. *Local 153, Glass Blowers Assn.*, 389 U. S. 463, 474–475 (1968).

The Board, established by Congress with primary responsibility for the protection of the public interest in this area, see *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U. S. 258 (1969), has determined that the company en-

gaged in illegal activities and that a remedial order is called for. Under these circumstances, the employees cannot be denied the protection of the order (with the possible sanction of contempt proceedings for violations) in the absence of a decision on the merits. "[I]f the Board's order is justified, it is entitled to have it enforced as a means of insuring that in future elections the conduct may not be repeated." *NLRB* v. *Marsh Supermarkets, Inc., supra,* at 111.

In this Court, the company essentially admits that the judgment below cannot be "based on mootness in its classical sense" and instead attempts to support it on other grounds. Thus, the company says—and we agree—that it is the courts of appeals that are charged with the primary and usual responsibility for granting or denying enforcement of Board orders. *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951). From this proposition and the fact that the Court of Appeals had before it the entire record in the case, the company urges that the decision below "should be construed as a determination, in the exercise of the discretion vested in the Court by Section 10 (e) of the Act, that on the basis of all of the circumstances, including the subsequent certification, enforcement was inappropriate."

We need not pause to consider whether such a determination would have been proper on the facts of this case. The simple answer is that the Court of Appeals did not pass upon the merits of the Board's petition for enforcement. While the company is, of course, free to argue on remand either that there was no violation or that if there was it was so marginal as not to justify judicial enforcement or both, these questions are for the Court of Appeals in the first instance. We will not pass on how that court might have regarded the case had it not erroneously concluded that the election and certification mooted the proceedings.

The judgment of the Court of Appeals dismissing the petition for enforcement is reversed and the case is remanded for consideration of the petition on its merits.

It is so ordered.